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In The
Supreme Court of the United States

October Term 1996

JOSEPH J. MATHY, and SARAH G. MATHY,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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93 pp

Question Presented

Did the Supreme Court of Virginia err in determining that the tax imposed by the District of Columbia pursuant to Title VIII of Article I of the District of Columbia Revenue Act of 1947, as amended, on District of Columbia sourced rental business income of a Virginia resident for the years 1991, 1992 and 1993 is illegal and unauthorized by Section 602(a)(5) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (the D.C. "Home Rule Act")?

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Petition for Writ of Certiorari

Petitioners respectfully petition the Supreme Court of the United States to issue a Writ of Certiorari to review the decision of the Supreme Court of Virginia (and the Order denying rehearing) which decided that the tax imposed by District of Columbia on a resident of Virginia, i.e. a nonresident of the District of Columbia, on rental business income entirely sourced in the District of Columbia is a commuter tax and is therefore illegal and unauthorized by Section 602(a)(5) of the District of Columbia Home Rule Act.

Opinions Below

The opinion of the Supreme Court of Virginia herein, Joseph J. Mathy, et al. v. Commonwealth of Virginia Department of Taxation, 253 Va. 356; 483 S.E. 2d 802 (1997), is reprinted at App. pp.1 through 8. Petitioners' Petition for Rehearing and the order of the Supreme Court of Virginia denying said Petition are reprinted at App. p. 9. The Opinion of Judge Gerald Bruce Lee of the Circuit Court of Fairfax County, Virginia dated February 26, 1996 and final order of March 29, 1996 are reprinted at App. p.13.

Jurisdiction

The opinion of the Supreme Court of Virginia herein dated April 18, 1997 and the denial of Petitioners' Petition for Rehearing on June 6, 1997 decide an important issue arising under the statutes and Constitution of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

Statutes and Constitutional Provisions Involved in the Case

1. U.S. Constitution:

Article I, Section 8:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States….."

Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 1, Amendment XIV:

"…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

2. Virginia Code:

Section 58.1-332 of the Virginia Code:

"A. Whenever a Virginia resident has become liable to another state for income tax on any earned or business income for the taxable year, derived from sources outside the Commonwealth and subject to taxation under this chapter, the amount of such tax payable by him shall, upon proof of payment, be credited on taxpayer's return with the income tax so paid to the other state.

"However, no franchise tax, license tax, excise tax, unincorporated business tax, occupation tax or any tax characterized as such by the taxing jurisdiction, although applied to earned or business income, shall qualify for a credit under this section, nor shall any tax which, if characterized as an income tax or a commuter tax, would be illegal and unauthorized under such other state's controlling or enabling legislation qualify for a credit under this section....." (Emphasis added)

3. Statutes relating to the District of Columbia:

A. Section 602(a)(5) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, P.L. 93-198, 87 Stat. 774 (1973):

"Sec. 602. (a) The Council shall have no authority to pass any act contrary to the

provisions of this Act except as specifically provided in this Act, or to--...

"(5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of title I of the District of Columbia Income and Franchise Tax Act of 1947);...."

B. Other portions of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 including portions of Title I, Title III, Title IV, Title VI, and Title VII are reproduced in the Appendix at pages 28 through 31 .

4. Statutes relating to the D.C. tax involved herein:

A. Portions of the District of Columbia Revenue Act of 1947 and especially Title VIII of the District of Columbia Income and Franchise Tax Act of 1947 (being Title VIII of Article I of the District of Columbia Revenue Act of 1947) as originally enacted by Congress is reproduced at App. pp. 35 through 40. Public Law No. 195, 61 Stat. 345, Ch. 258 (July 16, 1947).

B. Subchapter VIII of Chapter 18 of Title 47 of the District of Columbia Code which is the unofficial codification of Title

VIII of the District of Columbia Income and Franchise Tax Act of 1947 as amended as in effect during the years 1991, 1992 and 1993 (the D.C. tax in question) is reproduced at App. pp. 41 through 43.[1]

Statement of the Case

1. Procedural History

Petitioners Joseph J. Mathy and his spouse Sarah G. Mathy filed their Application for Relief from Erroneous Assessments of Virginia Income Taxes on April 25, 1995 in the Circuit Court of Fairfax County, Virginia for correction of their Virginia income taxes for taxable years 1991, 1992 and 1993 based on their claim for the out-of-state tax credit under Section 58.1-332A of the Virginia Code for payment of the D.C. taxes in question for each of those years. After the case was at issue, all of the facts and exhibits were stipulated, cross motions for summary judgment were filed, and after argument on the issues, Judge Gerald Bruce Lee filed his opinion dated February 21, 1996 (App. pp.13, 14) finding that Petitioners were not entitled to the out-of-state income tax credit against their Virginia income taxes for payment of the District of Columbia taxes in question because the D.C. tax in question is not an income tax but is a noncreditable unincorporated business tax. A final order based on that opinion was entered by Judge Lee on March 29, 1996. (App. pp. 1 through 8)

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[1] Please note that the D.C. Code merely compiles the Act as amended in a convenient compilation but the official law is the above cited 1947 Act as amended. The bold headings of the Code sections are not part of the Act but represent headings inserted by the compiler of the codification.

Appeal from said order was taken to the Supreme Court of Virginia.[2] After briefing and argument, Justice Barbara Milano Keenan issued an opinion for the Court dated April 18, 1997 in which all issues were decided in favor of Petitioners except the crucial issue pursued in this Petition for Writ of Certiorari, namely whether the District of Columbia tax in question was illegal or unauthorized by Section 602(a)(5) of the Self-Government and Governmental Reorganization Act of 1973 (hereinafter referred to as the "Home Rule Act"). The Opinion determined that the District of Columbia tax in question is an income tax and when applied to a nonresident's business income is illegal and unauthorized by said Section 602(a)(5). (App. pp. 1,6 - 8)

Petitioners filed their Petition for Rehearing on May 15, 1997 with respect to this issue. (Appendix at pages 50 - 60.)[3] Petitioners' Petition for Rehearing was denied by Order of the Supreme Court of Virginia dated June 6, 1997. (App. p. 22) Petitioners seek a Writ of Certiorari to the Supreme Court of Virginia with respect to whether the District of Columbia tax in issue as applied to a nonresident of the District of Columbia is illegal or unauthorized by Section 602(a)(5) of the District of Columbia Home Rule Act.

2. Statement of Facts

The facts in this case are not in dispute. Petitioners, Joseph J. Mathy and his spouse Sarah G. Mathy, are residents of Fairfax County, Virginia. Joseph Mathy is a

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[2] The Court refused to grant appeal as to Petitioners' constitutional arguments. App. p. 61. Petitioner's seek review herein of said refusal as well.

[3] Robert C. Fitzgerald, a similarly situated Virginian, filed a brief amicus curiae which was accepted into the record by the Court on June 6, 1997. App. pp. 45-49.

general partner in the Mills Building Associates, a District of Columbia general partnership (the partnership). The partnership's sole source of income during the relevant years 1991-1993 was rental income earned from the operation of an office building in the District of Columbia.

The partnership filed District of Columbia tax returns for 1991-1993 and paid the taxes due on the income earned from the commercial office rentals pursuant to Title VIII of the District of Columbia Income and Franchise Tax Act of 1947 as amended. (The codified version is at App. 28 - 34) .

The Mathys filed their Virginia income tax returns for 1991, 1992 and 1993 and reported Joseph Mathy's share of the net income from the Partnership. In those returns the Mathys did not claim the out-of-state tax credit against their Virginia income taxes for the above taxes paid to the District of Columbia. In 1994, the Mathys filed amended Virginia income tax returns for the tax years 1991, 1992, and 1993, claiming an out-of-state tax credit pursuant to Virginia Code Section 58.1-332A for payment of Mr. Mathy's share of the D.C. tax in question and requesting refunds for each of the tax years in issue. The Virginia Department of Taxation, Respondent herein, determined that the Mathys are not entitled to the tax credit under Section 58.1-332A. The Mathys then properly filed this suit in the Circuit Court of Fairfax County, which Court determined that the Mathys were not entitled to the out-of-state tax credit because the District of Columbia tax in question is not an income tax but is an unincorporated business tax. The trial court did not reach the question whether the District of Columbia tax in question is illegal or unauthorized by Section 602(a)(5) of the D.C. Home Rule Act although the issue was raised in the trial court. (See Judge Lee's Opinion App. pp. 15- 21.)

On appeal, the Supreme Court of Virginia determined that the District of Columbia tax in question is an income tax but then further determined that the D.C. tax in question when applied to a nonresident of the District of Columbia,

such as Joseph Mathy, is illegal and unauthorized by Section 602(a)(5) of the D.C. Home Rule Act, and on that basis denied the out-of-state tax credit. App. pp. 1, 6-8.

Reasons for Granting the Writ of Certiorari

1. **The Supreme Court of Virginia's determination that the District of Columbia tax in question when applied to the District sourced, nonexempted rental business net income of a nonresident of the District of Columbia is illegal or unauthorized by Section 602(a)(5) of the D.C. Home Rule Act incorrectly decides an important question of federal law.**

The District of Columbia tax in question was first enacted by Congress in 1947 as Title VIII of the District of Columbia Income and Franchise Tax Act of 1947, and while amended in some respects over the years, the Congressionally enacted tax has been enforced by the District of Columbia for over 50 years, taxing the nonexempted, District sourced business net income of residents and nonresidents doing business in the District alike.

When Congress enacted the Home Rule Act for the District of Columbia in 1973 (effective in 1975), all of the laws affecting the District of Columbia then in force were continued in force unless specifically repealed or were inconsistent with the Home Rule Act. The District of Columbia Income and Franchise Tax Act of 1947 was one of those laws carried over. It continues to be enforced in the District of Columbia to this very day.

While Congress in the Home Rule Act conferred on the new Council of the District of Columbia broad legislative powers with respect to most subjects affecting the District of Columbia, it denied authority to the Council to legislate on a

number of subjects. Congress spelled out the denial of authority in Section 602 of the Home Rule Act. Important to this case is the denial of authority to the new Council to impose a commuter tax. The exact language of Section 602(a)(5) is as follows:

> "(a) The Council shall have no authority to pass any act contrary to the provisions of the Act except as specifically provided in this Act, or to—
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of title I of the District of Columbia Income and Franchise Tax Act of 1947);...."

In 1975, the new Council for the District of Columbia purported to exercise its new legislative powers under the Home Rule Act by amending the District of Columbia Income and Franchise Tax Act in two respects. Section 604 of Law 1-23 changed the rate of the tax in question to 12% for 1975 and to 9% for years after 1975 and added a surtax of 10% on the tax, and Section 605 of Law 1-23 purported to repeal the exemptions for professionals and personal service businesses which had been in the law since 1947. D.C. Law 1-23, 22 DCR 2113 (October 21, 1975).

The attempt to repeal the exemptions for professionals and personal service businesses had the effect of subjecting for the first time the income earned by professionals and personal service businesses to the tax

imposed by Congress.[4] Nonresident professionals and nonresident owners of personal service businesses immediately challenged the repeal of the professional and personal service exemptions in Bishop v. District of Columbia, 401 A. 2d 955 (D.C. App. 1979), affirmed en banc 411 A. 2d 997 (D.C. App. 1980).

In Bishop the D.C. Court of Appeals, the highest court of the District, determined that the D.C. Council's repeal of the two exemptions had the effect of imposing the tax in question (which the Court determined to be an income tax) on the personal income of nonresident professionals and personal service business owners in violation of Section 602(a)(5) of the Home Rule Act, so the attempted repeal of the exemptions by the Council was illegal and unauthorized.

By contrast, no one has challenged the imposition of the Congressionally enacted tax on nonexempted, District sourced business net income of nonresidents of the District of Columbia for 50 years—not in the seventeen years since Bishop nor during the 22 years since the Home Rule Act became effective. There are a number of reasons there have been no challenges under Section 602(a)(5) with respect to imposition of the tax in question on the District sourced, nonexempt business income of nonresidents. The Supreme Court of Virginia incorrectly and inexplicably refused to accept these arguments which underscore the incorrectness of the Supreme Court of Virginia's decision.

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[4] Of course residents of the District of Columbia had been taxed on such income anyway under the general District of Columbia income tax law which taxes only residents.

(a) The District tax in question is an income tax imposed by Congress, not by the new District Council, so it is not illegal or unauthorized by Section 602(a)(5) of the Home Rule Act.

As noted above, Section 602(a)(5) of the Home Rule Act specifically denies authority to the new District Council to impose a tax on the personal income of nonresidents. The tax in question is not imposed by the District Council. It is imposed by Congress in the District of Columbia Income and Franchise Tax Act of 1947 as amended. That Act was carried over when the Home Rule Act was enacted and continues to be in force in the District. Various minor amendments have been made to that Act by the new District Council over the years. Specifically the new Council has changed the rate of tax slightly up and down at various times. See Footnote 2 of Petitioners' Petition for Rehearing (Appendix pages 50 through 60 at page 54 thereof) which describes the changes. Changing the rate and adding a surtax on the tax (which is really just a change of rate) and the addition of a minimum tax (again just a change of rate) are not an imposition of the tax. Congress still imposes the tax. Not the District of Columbia Council.

Congress has plenary legislative power over the District of Columbia (Article I, Section 8 of the U.S. Constitution) and has exercised it in the District of Columbia Income and Franchise Tax Act of 1947. That Congressional act, both prior to and after enactment of the Home Rule Act, applied, and continues to apply, to nonexempted, District sourced business income of nonresidents, such as Mr. Mathy's rental business income, just as it always has. The District Council has not attempted to change that in any way. Section 3 of Title VIII of the District of Columbia Income and Franchise tax of 1947, as amended, which imposes the

tax continues to be essentially the same as originally enacted except for the occasional changes in rates.

The Home Rule Act transferred the functions of various agencies including the enforcement of the tax in question, not to the new D.C. Council but to the successor agencies or the Mayor. The District of Columbia Income and Franchise Tax Act of 1947 as amended was enforced by the District of Columbia Assessor prior to Home Rule Act and that enforcement responsibility was transferred to the Mayor and in turn to the District of Columbia Department of Finance and Revenue. See Sections 448(a)(6), 712 and 714(a) of the Home Rule Act (App. pp. 30-34)

Moreover, the Home Rule Act specifically provided that no law or regulation affecting the District of Columbia on the effective date of title IV of the Home Rule Act was deemed amended or repealed by the Home Rule Act except to the extent specifically provided therein (and there was no such specific provision) or to the extent that such law was inconsistent with the Home Rule Act. See Section 717(b) of the Home Rule Act (App. p. 34). There is nothing inconsistent between the continuation of the District of Columbia Income and Franchise Tax Act and the Home Rule Act. The former was enacted by Congress and the latter merely prohibits the Council from enacting a commuter tax. Except for its abortive attempt to repeal the professional and personal service exemptions in 1975 described above, the Council has not enacted such a commuter tax. It literally has done nothing of any consequence with respect to the tax in question which continues to be imposed by Congress, of course, with the exemptions restored by the Bishop case.

Since the D.C. tax in question is a perfectly legal enactment by Congress in the exercise of its plenary power over the District of Columbia and the D.C. Council has not imposed, and does not now impose the tax, the determination by the Supreme Court of Virginia that the D.C. tax in question is illegal and unauthorized by Section 602(a)(5) of

the Home Rule Act is incorrect and in all justice should be overturned.

(b) The Supreme Court of Virginia erred in determining that Mr. Mathy's rental business income constitutes "personal income" of an individual not a resident of the District of Columbia. Such income is not "personal income" within the meaning of Section 602(a)(5) of the Home Rule Act.

Aside from the fact that the new D.C. Council has not imposed the tax in question at all, the kind of income which the prohibition of Section 602(a)(5) protects does not include nonexempted, District sourced, rental business income. Such income simply is not "personal income" within the meaning of the Home Rule Act.

The Court of Appeals for the District of Columbia in the Bishop case, supra, has indicated the kinds of income included within the definition of "personal income" in question. In quoting with approval the Virginia case of Groom v. Forst in the Circuit Court of Arlington County, Virginia, the D.C. Court of Appeals authoritatively indicated the kinds of "personal income" intended to be protected by Congress as follows:

> "Although this Congressional prohibition [Section 602(a)(5)] has served to protect nonresidents of the District of Columbia who are salaried employees or wage earners from D.C. income taxes, the removal of the exemption by the D.C. Council had the effect of subjecting all persons engaged in business, self-employed trades or professional occupations to the same tax in another guise. [Groom v. Forst, supra, at 3 (emphasis

supplied.)]" Bishop, supra 401 A. 2d at p. 958

The Bishop court thus indicated that Section 602(a)(5) of the Home Rule Act prior to the Council's attempted repeal of the exemptions prevented the Council from imposing a tax on wages and salaries of nonresidents earned in the District. It then notes that the attempted repeal of the exemptions by the D.C. Council served to impose the tax on the business income of professionals and others previously exempted by Congress.

The common feature of wages, salaries, professional fees and other personal service income is that they are personally earned by wage and salary earners, professionals and other personal service providers. Conspicuously absent is mention of other types of nonpersonally earned business income, i.e. other kinds of income not previously exempted, which continued to be taxed as they had been since 1947 and up to this very day. Mr. Mathy's rental business income has never been exempted and is not exempted from the Congressionally enacted tax in question now. The "personal income" protected by the Home Rule Act is the personal income identified by the Bishop court. Congress has taxed nonexempted, nonpersonally earned business income sourced in the District under this tax statute for more than 50 years without challenge. Contrary to Justice Keenan's opinion, such income is simply not "personal income" within the meaning of Section 602(a)(5) of the Home Rule Act.[5]

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[5] District of Columbia v. Califano, 647 A. 2d 761 (D.C. App. 1994) cited by Justice Keenan does not stand for the proposition that all income of an individual is "personal income" within the meaning of Section 602(a)(5) of the Home Rule Act. In Califano the D.C. Court of Appeals determined that the New York City unincorporated business income tax was an "individual income tax" imposed on the professional legal fees of a D.C. resident so it was creditable against the D.C.

The kind of tax Congress was concerned about was a commuter tax. The Bishop opinions point out that a commuter income tax is one imposed on income of nonresident persons who come into the District on a daily basis to earn a living. See Bishop, supra, 401 A. 2d at 958. Income from renting an office building is not the kind of income one associates with coming into the District to earn a living on a daily basis, especially where the management and rental of the building is done by an independent management and rental agent, as in the Mathy case.

The term "personal income" is a restrictive term and implies that there can be other kinds of income of an individual which is not personal income. If Congress had intended all income of nonresident individuals to be protected from D.C. Council tax enactments, there would be no reason to include the word "personal" at all. "Personal income" contemplates a distinction between income earned

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resident's D.C.income tax under the credit provision of the D.C. income tax which permits credit for payment of out-of-state "individual" income taxes. The D.C. Court of Appeals in Califano noted that the Bishop case had determined that such a tax imposed on professional fees of a nonresident was an income tax on personal income of an individual which the Court then said made such a tax an individual income tax. We have no quarrel with the Califano case. We agree that a tax on professional legal fee income is a tax on personal income just as the Bishop court determined and that such a tax is an individual income tax because of it.

That does not mean that all income of an individual is "personal income" within the meaning of the Home Rule Act. It merely means that professional legal fee income, i.e. earned income from personal services such as Mr. Califano's legal fee income, constitutes "personal income." That is exactly what the Bishop case inter alia determined. The D.C. Court of Appeals in Bishop determined that the tax in question is an income tax, and when applied to professionally earned legal fee income, it is a tax on "personal income." The Bishop court did not say or imply that the tax on other kinds of nonearned business income is a tax on "personal income." It had already identified the kinds of personally earned income that fell into that protected category.

by personal efforts as opposed to business income other than personal service income or professional income. Personally earned income of a nonresident is what a commuter tax is all about.[6]

Since Mr. Mathy's rental business income is not personally earned income and therefore is not "personal income" protected from taxation by the Home Rule Act, the opinion of the Supreme Court of Virginia dated April 18, 1997 (App. pp.1-8) and the Order of that Court denying Petitioners' Petition for Rehearing (App. p. 22) which found that such rental income does constitute "personal income" for that purpose is incorrect.

2. The Virginia Supreme Court failed to give Full Faith and Credit or Comity to the legislation affecting the District of Columbia in finding the D.C. tax in question illegal and unauthorized by Section 602(a)(5) of the Home Rule Act.

The Courts of Virginia are bound to give full faith and credit and comity, not only to the judicial decisions of the District of Columbia, but also to the legislative acts of the District of Columbia. Fauntleroy v. Lum, 210 U.S. 230, 52 L. Ed. 1039, 28 Sup. Ct. 641 (1908).

Finding the D.C. tax law in question illegal is a collateral attack on the validity of another jurisdiction's

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[6] The D.C. tax in question does not tax personally earned income of nonresidents at all. Wages and salaries of all employees (Section 47-1803.3(11)(A) of the D.C. Code) and reasonable compensation for the services of owners (Section 47-1803.3(11)(B)) are deductible and therefore not taxed. Professional and personal service business incomes are exempted and therefore not taxed. (Section 47-1808.1) What is left to be taxed is business net income which is not personally earned income, mostly income from employment of capital, such as rental income.

legislation in violation of the Full Faith and Credit clause of the U.S. Constitution. Fauntleroy v. Lum, supra.[7]

Comity too requires the courts of Virginia to recognize and enforce the legislative acts of the District of Columbia. Elmendorf v. Taylor, 10 Wheat. 152, 159-160, 6 L.Ed. 289, 292 (1825).

3. The Virginia Supreme Court failed to recognize the validity of the D.C. tax law in violation of the Supremacy Clause of the U.S. Constitution.

The D.C. tax law in question is an act of Congress. The Home Rule Act is an act of Congress. Both are entitled to recognition in the courts of Virginia under the Supremacy Clause of the U.S. Constitution. Clause 2 of Article Four, of the U.S. Constitution. The Virginia Supreme Court's determination violates the Supremacy Clause.

4. The Virginia Supreme Court erred in failing to apply the principle of the strong presumption of validity of a legislative enactment of the D.C. tax in question.

There is a strong presumption of the validity of a legislative enactment whether adopted by the Congress of the United States or by the D.C. Council. William L. Caldwell v. Seaboard System Railroad, Inc. 238 Va. 148, 380 S.E. 2d 910 (1989); The City of Charlottesville v. DeHaah, 228 Va. 578, 323 S.E. 2d 131 (1984); City Council of Emporia v. Newsome, 226 Va. 518, 311 S.E. 2d 761 (1984). The Virginia Department of Taxation failed in its burden to show

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[7] For many purposes the District of Columbia is deemed to be a State, including for puposes of Viginia tax credit in question. Viginia Regulation VR630-2-301; King v Forst, 239 VA 557, 391 S.E.2d 60 (1990).

that the tax in question was enacted by the D.C. Council. The Supreme Court of Virginia failed to enforce the presumption.

5. **The Virginia Supreme Court erred in failing to recognize the presumption of correctness of the assessment of the D.C. tax in question by the D.C. Department of Finance and Revenue. The Virginia Supreme Court lacks jurisdiction over necessary parties and the subject matter of the law to declare the D.C. tax law illegal or unauthorized.**

The D.C. tax in question was assessed by the D.C. Department of Finance and Revenue against Mr. Mathy's partnership and the partners thereof. The tax was paid in due course by the partnership and therefore by the partners.

The Virginia Supreme Court failed to recognize the presumption of correctness of the assessment of the D.C. tax in question. Assessment of the tax in question is conclusively presumed to be correct in the absence of challenge involved of that assessment in the District of Columbia courts by the taxpayer. The Virginia Supreme Court is not at liberty to find that very assessment illegal and unauthorized when it is conclusively recognized as valid in the District of Columbia. Fauntleroy v. Lum, supra. Neither the Mathys nor the Partnership have challenged the validity of the tax assessment in question in the District of Columbia Court.

6. **The Virginia Supreme Court's decision subjects Virginia residents to double income taxation of the same District sourced income in violation of the equal protection and due process clauses of the U.S. Constitution.**

Denying the Virginia out-of-state tax credit to Mr. Mathy, a Virginian, subjects him not only to the Virginia

income tax on the District sourced income but also to the District of Columbia tax in question on the same income. Such double taxation results because the Virginia Supreme Court failed to recognize the validity of the assessment and imposition of the tax on Mr. Mathy in the District of Columbia.

Providing the tax credit to some Virginians who pay other states' tax assessments deemed valid in those taxing jurisdictions and not giving the credit to Mr. Mathy for his payment of the District of Columbia tax assessment in question is an unwelcome form of double taxation against one's own citizens and violates the equal protection clause of the U.S. Constitution. Since the Virginia courts have no jurisdiction over the District of Columbia which assessed the tax on Mr. Mathy, the attempt to declare the D.C. tax in question illegal and unauthorized violates the due process clause of the U.S. Constitution.

It is ironic that the decision of the Supreme Court of Virginia in this case attempts to utilize a prohibition on the Council of the District of Columbia from taxing personal income of Virginia residents, i.e. a protection for Virginia citizens, to cause both the District of Columbia and Virginia to tax Virginia residents on the same income from the same source. There is no legislative indication that the Congress of the United States had any such punishment in mind.

7. The amount of tax revenue loss to the District of Columbia if the District tax in question is illegal and unauthorized by Section 602(a)(5) of the Home Rule Act is enormous and would be a significant blow to the fragile financial status of the District of Columbia.

The Respondent Virginia Department of Taxation estimated in 1991 that the amount of tax revenues which would be lost to Virginia if the D.C. tax in question were

creditable as a qualifying out-of-state income tax would approximate $4 million per year. The mathematics of the calculation means that approximately $90 million of net income of Virginia residents doing business in the District of Columbia is being taxed per year under the D.C. tax in question. Approximately $11 million of tax per year is therefore being paid to the District of Columbia under this tax by residents of Virginia doing business in the District.

Not just the tax payable to the District of Columbia by Virginians is at stake.[8] Under the Virginia Supreme Court's ruling, the tax in question on District sourced income of all nonresidents of the District would be illegal and unauthorized. In Mr. Mathy's partnership alone all but one of the partners are nonresidents of the District. There are literally hundreds of office buildings in the District of Columbia. Many are owned by nonresident individuals and/or by partnerships of nonresident individuals. There are many other nonexempted businesses in the District owned by nonresidents which pay the tax in question.

The amount of tax revenue loss to the District of Columbia if the ruling of the Virginia Supreme Court is correct would be enormous, and the loss would come at the worst possible time for the District, making it extremely

---

[8] According to the Comprehensive Annual Financial Reports for the District of Columbia the D.C. unincorporated business tax collections (the D.C. tax in question) for the most recent five years are as follows:

Year	Amount
1991	$30,512,000
1992	25,126,000
1993	35,960,000
1994	36,227,000
1995	39,272,000
1996	31,031,000

A significant portion of this is paid by nonresident business owners.

urgent for the Supreme Court of the United States to step in and determine the legality of the District tax in question.

Conclusion

For the reasons stated above, Petitioners respectfully petition this Honorable Court to issue its Writ of Certiorari to the Supreme Court of Virginia to review that Court's determination that the District of Columbia tax in question is illegal and unauthorized under Section 602(a)(5) of the District of Columbia Home Rule Act.

Thomas A. Frazier, Jr.
Counsel of Record for Petitioners

No. _____

In The
Supreme Court of the United States

October Term 1996

JOSEPH J. MATHY,
and
SARAH G. MATHY,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

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IN THE
SUPREME COURT OF VIRGINIA

Present: All the Justices

JOSEPH J. MATHY, ET AL.

v.
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION

Record No. 961290

Entered: April 18, 1997

OPINION BY JUSTICE BARBARA MILANO KEENAN

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

Gerald B. Lee, Judge

In this appeal, we consider whether two Virginia taxpayers are entitled to a credit under Code § 58.1-332(A) for taxes paid to the District of Columbia on income received from a partnership conducted in the District of Columbia.

The facts in this case are not in dispute. The appellants, Joseph J. Mathy and Sarah G. Mathy, are residents of Fairfax County. Joseph Mathy is a general partner in The Mills Building Associates, a District of Columbia general partnership (the partnership). The partnership's sole source of income during the relevant years was rental income earned from the operation of an office building in the District of Columbia.

The partnership filed District of Columbia tax returns for 1991, 1992, and 1993 and paid the taxes due on the

income earned from the commercial office rental pursuant to D.C. Code Ann. §§ 47-1808.1 to -1808.6 (1990). This subchapter, labelled "[t]ax on unincorporated businesses,"[1] provided, for the years at issue, that "for the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is levied . . . a tax at the rate of 10 per centum upon the taxable income of every unincorporated business," plus a surtax between 2.5% and 5% of the taxes due. D.C. Code Ann. § 1808.3 (1990) (amended 1994) (the UB tax). "Taxable income" is defined as "the amount of net income derived from sources within the District . . . in excess of the exemption granted under § 47-1808.4" D.C. Code Ann. § 47-1808.2(1).

Under the District of Columbia Code, these taxes may be assessed in the name of the unincorporated business, but are payable by the persons conducting the business. D.C. Code Ann. § 47-1808.5. As a general partner, Joseph Mathy was personally liable for payment of these taxes.[2]

The Mathy's filed Virginia income tax returns for 1991, 1992, and 1993, and reported Joseph Mathy's share of

---

[1] Under D.C. Code Ann. § 47-1808.1 (1990), the term "unincorporated business" is defined, in relevant part, as

> any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership . . . other than a trade or business conducted or engaged in by any corporation and include[s] any trade or business which if conducted or engaged in by a corporation would be taxable under subchapter VII of this chapter.

[2] D.C. Code Ann. § 41-114(2) provides that "[a]ll partners are liable . . . [j]ointly for all other debts and obligations of the partnership."

the net income from the District of Columbia partnership. When the Mathy's filed those returns, they did not claim an out-of-state tax credit against their Virginia taxes for the taxes paid pursuant to the UB tax.

In 1994, the Mathys filed amended Virginia income tax returns for the tax years 1991, 1992, and 1993, claiming an out-of-state tax credit pursuant to Code § 58.1-332(A) and requesting refunds from Virginia for each of the tax years in issue. Code § 58.1-332(A) provides:

> Whenever a Virginia resident has become liable to another state for income tax on any earned or business income for the taxable year, derived from sources outside the Commonwealth and subject to taxation under this chapter, the amount of such tax payable by him shall, upon proof of such payment, be credited on the taxpayer's return with the income tax so paid to the other state.
>
> However, no franchise tax, license tax, excise tax, unincorporated business tax, occupation tax or any tax characterized as such by the taxing jurisdiction, although applied to earned or business income, shall qualify for a credit under this section, nor shall any tax which, if characterized as an income tax or a commuter tax, would be illegal and unauthorized under such other state's controlling or enabling legislation qualify for a credit under this section.

The Virginia Department of Taxation (the Department) determined that the Mathys' were not entitled to the tax credit under Code § 58.1-332(A). The Mathys' then

filed in the trial court this application for relief from erroneous assessments of Virginia income taxes.

The trial court granted the Department's motion for summary judgment, holding that the Mathys' were not entitled to a credit against their Virginia taxes for payment of the UB tax. The court stated that a plain reading of D.C. Code Ann. § 47-1808.3 indicates that the tax imposed is not an income tax subject to credit under Code § 58.1-332(A), but is an unincorporated business tax on income imposed for the privilege of conducting business in the District of Columbia. Thus, the court held that Code § 58.1-332(A) does not provide a credit for payment of this tax.

On appeal, the Mathys' argue that the trial court's ruling conflicts with the decisions of this Court in King v. Forst, 239 Va. 557, 391 S.E.2d 60 (1990), and the District of Columbia Court of Appeals in Bishop v. District of Columbia, 401 A.2d 955 (D.C. 1979), aff'd en banc, 411 A.2d 997 (1980). The Mathys' contend that both cases held that the UB tax is an income tax, and not an unincorporated business tax, franchise tax, or privilege tax.

In response, the Department contends that the UB tax is an unincorporated business tax within the meaning of Code § 58.1-332(A), and is characterized as such by the District of Columbia. In the alternative, the Department argues that even if this tax is characterized as an income tax, it is illegal under the District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified in part in Title I, D.C. Code Ann. (1992)), and, thus, the Mathys' are not entitled to a credit under Code § 58.1-332(A).

The District of Columbia Court of Appeals, the highest court of that jurisdiction, examined the UB tax in Bishop v. District of Columbia, 401 A.2d at 958-61. The court held that the tax is an income tax, explaining that "a tax on gross receipts is not an income tax; a tax on net income is so, regardless of its nomenclature." Id. at 960.

In reaching this conclusion, the court emphasized that a tax must be characterized based on its nature and effect, rather than on any label or title affixed to its provisions. Id. at 958. The court noted that, by its terms, the UB tax is a net income tax because it is levied on taxable income, which is defined as that amount of net income in excess of the exemption granted by D.C. Code Ann. § 47-1808.4. Id. at 960.

Under principles of comity, we applied the rule of Bishop in King v. Forst. There, we explained:

> [T]he decisions of the highest court of a jurisdiction, interpreting the law of that jurisdiction, are controlling authority in the courts of all other States as well as in the Federal courts. This principle applies even where the construction given by the foreign court to its law is directly opposite to the construction the domestic court gives to its own law.

239 Va. at 561, 391 S.E.2d at 62 (citations omitted).

Applying the construction given D.C. Code Ann. § 47-1808.3 by the District of Columbia Court of Appeals, we held that the UB tax is an income tax. King, 239 Va. at 561, 391 S.E.2d at 62. Thus, we concluded that the Virginia taxpayer, a sole proprietor of an unincorporated printing business located in the District of Columbia, was entitled to a credit under former Va. Code § 58.1-332 for payment of the UB tax. Id.

Our decision in King is dispositive of the issue whether the UB tax is an income tax. We find no merit in the Department's argument that the second paragraph of Code § 58.1-332(A), added by the General Assembly in 1991, effectively overrules King. The "taxing jurisdiction," as the term is used in that paragraph, is the District of

Columbia, which has characterized the tax as an income tax, irrespective of its title, "[t]ax on unincorporated businesses." Bishop, 401 A.2d at 960. Thus, the second paragraph of Code § 58.1-332(A) does not affect our ruling in King that the UB tax is an income tax.

Our conclusion is not altered by the fact that Bishop was based on a challenge to the UB tax as applied to professionals and personal services businesses, rather than to other types of unincorporated businesses such as the one in which Joseph Mathy is a general partner. The court's holding in Bishop was based on the inherent nature of the UB tax, rather than on the type of unincorporated business income at issue.

In addition, in King, we applied the rule of Bishop to income derived from a printing business conducted in the District of Columbia, which did not involve professional or personal services. Our holding was based on the structure and effect of the tax, as characterized by the District of Columbia Court of Appeals, rather than on the type of unincorporated business conducted by the taxpayer. See King, 239 Va. at 560, 391 S.E.2d at 62.

Since the UB tax is an income tax, the Mathys are entitled to a credit under Code § 58.1-332(A) unless the tax "would be illegal and unauthorized under such other state's controlling or enabling legislation." Code § 58.1-332(A). Therefore, in the present case, we must determine whether the UB tax would be illegal and unauthorized under the District of Columbia's Home Rule Act.

In the Home Rule Act, the United States Congress gave the District of Columbia Council legislative authority over most matters involving the District. See D.C. Code Ann. §§ 1-201 to - 229.7. However, the Home Rule Act expressly prohibits the Council from imposing a "commuter tax," defined as "any tax on the whole or any portion of the personal income . . . of any individual not a resident of the District . . . ." D.C. Code Ann. § 1-233(a)(5); see Bishop,

401 A.2d at 957-58. Neither the Home Rule Act nor any other portion of the District of Columbia Code defines the term "personal income."

The Department argues that if D.C. Code Ann. § 47-1808.3 is an income tax, it violates this restriction in the Home Rule Act as a tax on the personal income of a nonresident of the District. In response, the Mathys argue that the tax does not violate the Home Rule Act, but "is a perfectly legal income tax which does not tax personal income, the only kind of income protected by [the above] section of the Home Rule Act." The Mathys further contend that the tax is imposed on their District of Columbia rental business income, not on their personal income. We disagree with the Mathys.

The rationale advanced by the Mathys was directly addressed and rejected in Bishop. The court concluded that "[t]he tax is levied upon personal income. If we dealt here with a corporate franchise tax, the result would be different." Id. at 961. The court noted that the scheme of the tax illustrates its nature as a personal net income tax, and that since the tax is imposed on unincorporated businesses, it is "in reality a tax on the associates or partners who run the business." Id. at 961 n.18.

In District of Columbia v. Califano, 647 A.2d 761, 763 (D.C. 1994), the District of Columbia Court of Appeals again recognized that the UB tax is a personal income tax. The court explained, "in the language of Bishop," that this tax personally burdens the individuals who comprise the unincorporated business and operates as an income tax on them individually. Califano, 647 A.2d at 763-64. Since both Bishop and Califano instruct that the UB tax imposes a tax on personal income, we must conclude that the tax imposed on the Mathys is illegal and unauthorized under the Home Rule Act for purposes of qualifying for a credit under Code § 58.1-332(A), because the Home Rule Act prohibits the imposition of "any tax on the whole or any portion of the

personal income . . . of any individual not a resident of the District . . ." D.C. Code Ann. § 1-233(a)(5). Thus, the Mathys are not entitled to a credit under Code § 58.1-332(A), based on the plain language of the second paragraph of that statute.

This is a case in which the trial court has reached the correct result but has given the wrong reason. We will sustain the result on the grounds assigned above. Doswell Ltd. Partnership v. Virginia Elec. & Power Co., 251 Va. 215, 225, 468 S.E.2d 84, 90 (1996); Richmond, Fredericksburg & Potomac R.R. v. Metropolitan Washington Airports Auth., 251 Va. 201, 214, 468 S.E.2d 90, 98 (1996); Robbins v. Grimes, 211 Va. 97, 100, 175 S.E.2d 246, 248 (1970).

For these reasons, we will affirm the trial court's judgment.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at Supreme Court Building in the City of Richmond on Wednesday *the* 23rd *day of* October , 1996.

Joseph J. Mathy, et al.,
Appellants,

against

Commonwealth of Virginia
Department of Taxation,
Appellee.

Record No. 961290
Circuit Court No. L140458

Entered: October 23, 1996

From the Circuit Court of Fairfax County

Upon the petition of Joseph J. Mathy and another appeal is awarded them from a judgment rendered by the Circuit Court of Fairfax County on the 29th day of March, 1996 in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and the Commonwealth of Virginia Department of Taxation was defendant; upon the petitioners, or some one for them, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the said court below in the penalty of $500, within 15 days from the date of the Certificate of Appeal, with conditions as the law directs.

This appeal, however, is limited to the consideration of assignments of error Nos. 1 through 8 and 10 which read as follows:

The court below erred in the following respects:

(1) In granting appellee Department's motion for summary judgment and in failing to grant appellants' motion for summary judgment.

(2) In failing to even mention, much less apply the decision of this Court in King v. Forst, 239 Va. 557, 391, S.E.2d 60 (1960) which is directly applicable and controlling on the key issues in this case and in so doing has failed to follow controlling precedent of this Court.

(3) In misreading Bishop v. District of Columbia, 401 A.2d 955 (D.C. App. 1979), affirmed en banc 411 A.2d 997 (D.C. App. 1980), which, contrary to Judge Lee's opinion, held that the D.C. tax in question is an income tax and not an unincorporated business tax or franchise tax or privilege tax.

(4) In failing to give comity to the Bishop case, supra, the decision of the highest court of the District of Columbia, which clearly held that the D.C. tax in question is an income tax and not an unincorporated tax or franchise tax or privilege tax.

(5) In obviously relying on the title or label of Subchapter VIII of Chapter 18 of Title 47 of the D.C. Code (without so stating) in determining the type of tax the D.C. tax in questions is instead of relying on the decision of the D.C. Court of Appeals in Bishop, supra, which held that that title or label was both misleading and not controlling as to the type of tax being imposed by the District of Columbia and which held that the tax in question is an income tax in spite of the title or label in the statute and is not an unincorporated business tax or a franchise tax or a privilege tax.

(6) In mischaracterizing the D.C. tax in question as an unincorporated business tax "on" unincorporated businesses and as an unincorporated business tax on income when a plain reading of the D.C. statute in question

demonstrates beyond question that it is a tax levied directly on income and is therefore an income tax and is not an unincorporated business tax and is not a tax on unincorporated businesses.

(7) In failing to implement the clear policy of Virginia to prevent double income taxation of its residents, including Mr. Mathy.

(8) In relying on Giesecke v. Department of Taxation, Law No. 124781 (Cir. Ct. Fairfax 1994), which did not involve the D.C. tax in question and is clearly distinguishable.

(10) In failing to decide the other issues presented to the Court, i.e. whether the D.C. tax in question is characterized as an unincorporated business tax by the "taxing jurisdiction," and whether the D.C. tax in question if characterized as an income tax would be illegal under Section 602(a)(5) of the D.C. Home Rule Act.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of errors Nos. 1 through 8 and 10, and the briefs to be filed shall be limited to such discussion as is relevant to those assignments of error.

The petition for appeal is refused as to assignment of error No. 9.

Reference is made to the said petition for the names of all the appellants involved in this appeal.

A Copy,

Teste:

/s/David B. Beach
Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on October 23, 1996 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 24th day of October, 1996.

/s/David B. Beach
Clerk

VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

JOSEPH J. MATHY, et al.,
Plaintiffs,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,
Defendant.

At Law No.: 140458
Entered: March 29, 1996

FINAL ORDER

This cause came to be heard on the 17th day of January 1996, upon the cross Motions for Summary Judgment filed by the parties, the pleadings, stipulation of facts, memoranda of law and was argued by counsel.

In the letter Opinion dated February 21, 1996, which is incorporated herein by reference, the court issued its opinion that the defendants' Motion for Summary Judgment should be granted for the reasons and conclusions stated therein.

It is therefore, ADJUDGED, ORDERED AND DECREED that defendants' Motion for Summary Judgment be, and the same hereby is, granted and the plaintiff's Motion for Summary Judgment is denied. A copy of this FINAL ORDER shall be certified by the Clerk of this Court to all counsel of record.

Nothing further remaining to be done in this matter, it is hereby ORDERED that this cause be removed from the docket.

ENTER:/s/_____
Judge

DATE: March 29, 1996

I ASK FOR THIS:

/s/_____
Mary G. Morris
Senior Assistant Attorney General
Counsel for the Defendant

SEEN AND PLAINTIFFS' EXCEPTIONS THERETO NOTED BELOW:

/s/ _____
Thomas A. Frazier, Jr., Esquire
Counsel for the Plaintiff

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Entered: February 21, 1996

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RE: Joseph J. Mathy et al. v. Commonwealth of Virginia, Department of Taxation

At Law No.: 140458

Dear Counsel:

This matter is before the Court on Mr. and Mrs. Joseph J. Mathy's ("Plaintiffs") and the Commonwealth of Virginia Department of Taxation's ("the Department") Cross Motions for Summary Judgment. The issue presented is whether Plaintiffs are entitled to tax credits against their Virginia income taxes for the years 1991, 1992, and 1993 for taxes they paid to the District of Columbia pursuant to Va. Code Ann. § 58.1-332(A). Plaintiffs paid taxes to the

District of Columbia on income earned from commercial office rental pursuant to D. C. Code Ann. § 47-1808.3. The Department contends that Plaintiffs are not entitled to a tax credit because Va. Code 332(a). Accordingly, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

Facts

The taxpayers, Joseph and Sara Mathy, are residents of Virginia. Mr. Mathy is a partner in The Mills Building Associates ("the Partnership"), a District of Columbia general partnership which owns commercial office real estate in Washington, D. C. From 1991 through 1993, the Plaintiffs earned income from the Partnership, reported the income on their Virginia income tax returns and paid taxes on the income.

From 1991 through 1993, the Partnership filed District of Columbia tax returns and paid the unincorporated business taxes. Plaintiffs did not claim a credit under Va. Code Ann. § 58.1-332 in their original tax filings for the payment of the District of Columbia unincorporated business taxes paid. The Department denied the Plaintiffs refund claims.

Characterization of D. C. Unincorporated Business Tax

Plaintiffs argue that they are entitled to a tax credit against their Virginia taxes pursuant to Va. Code Ann. § 58.1-332[1]. Plaintiffs contend that they are entitled to a tax

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[1] Section 58.1-332 of the Code of Virginia states:

> Whenever a Virginia resident has become liable to another state for income tax on any earned or business income for the taxable year, derived from sources outside the Commonwealth and subject to

credit under Va. Code Ann. § 58.1-332 for several reasons. First, Plaintiffs argue that the tax which they paid on the earnings of the Partnership pursuant to D. C. Code Ann. § 47-1808.3 is a net income tax on earned or business income from non-Virginia sources. Plaintiffs further argue that although D. C. Code Ann. § 47-1808 is titled "Tax on Unincorporated Businesses" the substance and effect of the tax are controlling rather than the title of the status. Plaintiffs maintain that the District of Columbia Court of Appeals in Bishop v. District of Columbia, 401 A.2d 955 (D. C. Ct. Apps. 1979) held that D. C. Code Ann. § 47-1808.3, the tax on unincorporated businesses, is an illegal net income tax.

Second, Plaintiffs argue that the District of Columbia, the relevant taxing jurisdiction, does not characterize the tax in question as an unincorporated business tax and thus the Court must give comity to the taxing jurisdiction's characterization of the tax.

Third, Plaintiffs contend that Virginia's policy against double taxation supports the allowance of the credit in the instant case. Finally, Plaintiffs state that the characterization of the tax as one of the prohibited taxes in Va. Code Ann. § 58.1-332(A) would make the Virginia provision unconstitutional per se.

The Department argues that Plaintiffs are not entitled to a credit under Va. Code Ann. § 58.1-332 for several reasons. First, the Department argues that the tax paid by Plaintiffs was an incorporated business tax as stated on the

(..continued)

> taxation under this chapter, the amount of such tax payable by him shall, upon proof of such payment, be credited on the taxpayer's return with the income tax so paid to the other state. However, no franchise tax, license tax, excise tax, unincorporated business tax, occupation tax or any tax characterized as such by the taxing jurisdiction, although applied to earned or business income, shall qualify for a credit under this section.

face of D. C. Code Ann. § 47.1801.1. The Department contends that the Bishop court ruled that to the extent that the tax on unincorporated businesses imposed a tax on professionals and personal service businesses, it imposed an invalid income tax. The Department maintains that the Bishop court did not rule that the entire tax on unincorporated businesses constituted an income tax.

Second, the Department argues in the alternative that the unincorporated business tax is characterized as a franchise tax on unincorporated business by the taxing jurisdiction for which no credit is available under Va. Code Ann. § 58.1-332. Third, the Department contends that if the unincorporated business tax were characterized as an income tax in the District it would be illegal under the Home Rule Act[2] and no credit would be available under Va. Code Ann. § 58.1-332. Finally, the Department maintains that Plaintiff's constitutional argument fails because there is no aspect of discrimination in the interpretation or application of Va. Code Ann. § 58.1-332.

The Court holds that Plaintiffs are not entitled to a tax credit under Va. Code Ann. § 58.1-332 (A). First, D. C. Code Ann. § 47-1808.3 is a tax on unincorporated businesses. Section 47-1808.1 of the D. C. Code defines the unincorporated business tax. Section 47-1808.1 of the D. C. Code Annotated states:

> For the purposes of this chapter (not alone of this subchapter) and unless otherwise required by the content, the words "unincorporated business" mean any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or

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[2] Home Rule Act is the popular name for the District of Columbia Self-Government and Governmental Reorganization Act. Pub. L. No. 93-198.87, Stat. 774 (1973).

> common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation and include any trade or business which if conducted or engaged in by a corporation would be taxable under subchapter VII of this chapter. The words "unincorporated business" do not include . . . A trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individuals or the members of the partnership or other entity in the conducting or the carrying on of a trade or business and in which capital is not a material income-producing factor.

Additionally, D. C. Code Ann. § 47-1808.5 provides that the unincorporated business tax shall be payable by the:

> person or persons, jointly and severally, conducting the unincorporated business. The taxes imposed under this subchapter may be assessed in the name of the unincorporated business or in the name or names of the person or persons liable for the payment of such taxes, or both.

The Court holds that a plain reading of the statute reveals that D. C. Code Ann. § 47-1808.3 imposed an unincorporated business tax on income received from the Partnership. Section 47-1808.3 of the D. C. Code imposes a tax on unincorporated business for the privilege of doing

business in the District of Columbia and receiving income in the District of Columbia. The Mills Building Associates is an unincorporated business under D. C. Code § 47-1808.1.[3]

Finally, the Court holds that Plaintiff's attach on the constitutionality of Va. Code Ann. § 58.1-332 is without merit. Section 58.1-332(A) of the Code of Virginia is valid and applies equally to all persons within the class. DiAntonio v. Northhampton-Assomack Memorial Hospital, 628 F. 2d 287 (4th Cir. 1980).

Accordingly, Plaintiffs paid an unincorporated business tax for revenue earned by The Mills Building Associates pursuant to D. C. Code Ann. § 47-1808.3. Section 58.1-332(A) of the Code of Virginia does not entitle unincorporated business tax to a credit. Therefore, Defendant's Motion for Summary Judgment is granted. The Department will please prepare an order to the Court and

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[3] Plaintiffs argue that they are entitled to a credit under Bishop. The Court finds, however, that Bishop did not hold that an unincorporated business tax is a net income but rather Bishop excluded from its definition of a trade or business:

> . . . in which more than 80 per centum of gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income producing factor.

Bishop at 957. The Court holds that Bishop provided an exemption for professional and personal service businesses form the application of the unincorporated business tax.

present it to Plaintiffs' counsel preserving their exceptions for entry not later than March 22, 1996.

Cordially yours,

*/s/*_____
Gerald Bruce Lee

GBL/scs

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* June, 1997.

Joseph J. Mathy, et al.,
Appellants,

against

Commonwealth of Virginia
Department of Taxation,
Appellee.

Record No. 961290
Circuit Court No. L140458

Entered: June 6, 1997

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 18th day of April, 1997 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/_____
Clerk

Subchapter VIII. Tax on Unincorporated Businesses.

§ 47-1808.1 Tax on unincorporated businesses - Definition.

For the purposes of this chapter (not alone of this subchapter) and unless otherwise required by the context, the words "unincorporated business" mean any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership or limited special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation and include any trade or business which if conducted or engaged in by a corporation would be taxable under subchapter VII of this chapter. The words "unincorporated business" do not include:

(1) A trade or a business which by law, customs, or ethics cannot be incorporated;

(2) A trade, a business, or a profession which can be incorporated only under Chapter 6 of Title 29;

(3) A trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individuals or the members of the partnership or other entity in the conducting or the carrying on of a trade or a business and in which capital is not a material income - producing factor; or

(4) A trade or business engaged in by a blind person licensed by the District of Columbia pursuant to An Act To authorize the operation of stands in Federal buildings by blind persons, to enlarge the economic opportunities of the blind, and for other purposes (20 U.S.C. § 107 et seq.). (July 16, 1947, 61 Stat. 345, ch. 258, art. I, title VIII, § 1; Dec. 10, 1971, 85 Stat. 582, Pub. L. 92-180, § 21; 1973 Ed.,

§ 47-1574; Oct. 21, 1975, D.C. Law 1-23, title VI, § 605, 22 DCR 2113; June 11, 1982, D.C. Law 4-118, § 113, 29 DCR 1770; Oct. .8, 1983, D.C. Law 5-32, § 6(a), 30 DCR 4013; Mar. 12, 1986, D.C. Law 6-89, § 2, 33 DCR 304; Oct. 1, 1987, D.C. Law 7-29, § 2(h)(1), 34 DCR 5097.)

§ 47 - 1808.2. Same - Definitions.

For purposes of this subchapter, the words:

(1) "Taxable income" mean the amount of net income derived from sources within the District, within the meaning of §§ 47-1810.1 to 47-1810.3, in excess of the exemption granted under § 47-1808.4.

(2) "Taxable period" means a taxable year, or a portion of a taxable year. (July 16, 1947, 61 Stat. 346, ch. 258, art. I, title VIII, § 2; 1973 Ed., § 47-1574a; Sept. 26, 1984, D.C. Law 5-113, § 302(b)(1), 31 DCR 3974; Oct. 1, 1987, D.C. Law 7-29, § 2(h)(2), 34 DCR 5097.)

§ 47-1808.3. Same - Levy and rates.

(a) Except as exempted under subchapter II of this chapter, for the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is levied:

(1) For 1 taxable year beginning after December 31, 1974, a tax at the rate of 12 per centum upon the taxable income of every unincorporated business, whether domestic or foreign;

(2) For the taxable years beginning after December 31, 1975, a tax at the rate of 9 per centum upon taxable income ever unincorporated business whether domestic or foreign, except that, effective October 1, 1984,

the rate of tax shall be 10 per centum upon the taxable income for any taxable period; and

(3) A surtax on the tax determined under paragraph (2) of this subsection at the following rates:

(A) 10% for any taxable period beginning after December 31, 1975, and ending before October 1, 1984;

(B) 5% for any taxable period beginning after September 30, 1984, and ending before October 1, 1987;

(C) 2.5% for any taxable period beginning after September 30, 1987, and ending before October 1, 1989;

(D) 5% for any taxable period beginning after September 30, 1989, and ending before October 1, 1992;

(E) 2.5% for any taxable period beginning after September 30, 1992.

(b) The minimum tax payable under this section shall be $100. (July 16, 1947, 61 Stat. 346, ch. 258, art. I title VIII, § 3; Aug. 2, 1968, 82 Stat. 612, Pub. L. 90-450, title II. § 202(b); Oct. 31, 1969, 83 Stat. 179, Pub. L. 91-106, title VI, § 604(a)(2); Dec. 15, 1971, 85 Stat. 654, Pub. L. 92-196, title IV, §§ 402, 404; 1973 Ed., § 47-1574b; Oct. 21, 1975, D.C. Law 1-23, title VI, § 604, 22 DCR 2112; July 27, 1976, D.C. Law 1-77, § 3, 23 DCR 1219; Mar.16, 1978, D.C. Law 2-58, § 202, 24 DCR 5765; June 22, 1983, D.C. Law 5-14, § 903, 30 DCR 2632; Sept. 26, 1984, D.C. Law 5-113, § 302(b)(2), 31 DCR 3974; Oct. 1, 1987, D.C. Law 7-29, § 2(h)(3), 34 DCR 5097; July 26, 1989, D.C.
Law 8-17, § 2(e), 36 DCR 4160.)

§ 47-1808.4 Same - Exemption.

Before computing the tax upon the taxable income of an unincorporated business, there shall be deducted therefrom an exemption of $5,000: Except, that where the period covered by a return is less than a year, or where a return shows that an unincorporated business has been carried on for less than 12 months, such exemption shall be prorated on a daily basis: Provided, however, that any amount exempt under this section from the tax imposed by § 47-1808.3 shall be reported and included in the gross income of that person or those persons entitled to a share therein proportion to the share to which each person is entitled, and shall be reported in the return of each such person for his or her taxable year in which is ended the taxable year of the unincorporated business. (July 16, 1947, 61 Stat. 346, ch. 258, art. I, title VIII, § 4; May 27, 1949, 63 Stat. 132, ch. 146, title IV § 416; 1973 Ed., § 47-1574c; Feb. 3, 1976, D.C. Law 1-44, § 4, 23 DCR 4057; Oct. 8, 1983, D.C. Law 5-32, § 6(b), 30 DCR 4013.)

§ 47 - 1808.5. Same - Persons liable for payment.

The taxes imposed by § 47-1808.3 shall be payable by the person or persons, jointly or severally, conducting the unincorporated business. The taxes imposed under this subchapter may be assessed in the name of the unincorporated business or in the name or names of the person or persons liable for the payment of such taxes, or both. (July 16, 1947, 61 Stat. 346, ch. 258, art. I, title VIII, § 5; 1973 Ed., § 47-1574d.)

§ 47-1808.6. Partnerships.

Individuals carrying on any trade or business in partnership in the District, other than an unincorporated

business, shall be liable for income tax only in their individual capacities. The tax on all such income shall be assessed against the individual partners under §§ 47-1806.1 to 47-1806.6. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year; or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed. The phrase "accounting period" as used in this section refers to the calendar or fiscal year of a partnership. (July 16, 1947, 61 Stat. 346, ch. 258, art. I, title VIII, § 6; 1973 Ed., § 47-1574e; Oct. 1, 1987, D.C. Law 7-29, § 2(h)(4), 34 DCR 5097.)

§ 47-1808.7. Tax credit.

For taxable years beginning after December 31, 1988, the amount of tax payable by an unincorporated business approved as qualified under § 5-1404 shall be reduced be reduced by a credit equal to the credits available to qualified incorporated businesses pursuant to §§ 47-1807.4, 47-1807.5 and 47-1807.6 (July 16, 1947, ch. 258, art. I, title VIII, § 7, as added Oct. 20, 1988, D.C. Law 7-177, § 10(c), 35 DCR 6158.

DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT

An Act to Reorganize the Governmental Structure of the District of Columbia, to Provide a Charter for Local Government in the District of Columbia Subject to Acceptance by a Majority of the Registered Qualified Electors in the District of Columbia, to Delegate Certain Legislative Powers to the Local Government, to Implement Certain Recommendations of the Commission on the Organization of the Government of the District of Columbia, and for Other Purposes

Be it enacted by the Senate
and the House of Representatives of the
United States of America in Congress assembled,

TITLE I - SHORT TITLE, PURPOSES, AND DEFINITIONS

SHORT TITLE

SEC. 101. This Act may be cited as the "District of Columbia Self-Government and Governmental Reorganization Act".

STATEMENT OF PURPOSES

SEC. 102. (a) Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by

the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

(b) Congress further intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions irrespective of whether the charter for greater self-government provided for in title IV of this Act is accepted or rejected by the registered qualified electors of the District of Columbia.

TITLE III - DISTRICT CHARTER PREAMBLE LEGISLATIVE POWER, AND CHARTER AMENDING PROCEDURE

DISTRICT CHARTER PREAMBLE

SEC. 301. The charter for the District of Columbia set forth in title IV shall establish the means of governance of the District following its acceptance by a majority of the registered qualified electors of the District voting thereon in the charter referendum held with respect thereto.

ŁEGISLATIVE POWER

SEC. 302. Except as provided in sections 601, 602, and 603, the legislative power of the District of Columbia shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the

tenth section of the first article of the Constitution of the United States.

TITLE IV - THE DISTRICT CHARTER

PART A-THE COUNCIL

Subpart 1 - Creation of the Council

CREATION AND MEMBERSHIP

SEC. 401. (a) There is established a Council of the District of Columbia; and the members of the Council shall be elected by the registered qualified electors of the District.

POWERS OF THE COUNCIL

SEC. 404. (a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. In addition, except as otherwise provided in this Act, all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan Numbered 3 of 1967, shall be carried out by the Council in accordance with the provisions of this Act.

FINANCIAL DUTIES OF THE MAYOR

SEC. 448. (a) Subject to the limitations in section 603, the Mayor shall have charge of the administration of the financial affairs of the District and to that end he shall --

(6) supervise and be responsible for the levying and collection of all taxes, special assessments, license fees, and other revenues of the District, as required by law, and receive all moneys receivable by the District from the Federal Government or from any court, agency, or instrumentality of the District.

TITLE VI - RESERVATION OF CONGRESSIONAL AUTHORITY

RETENTION OF CONSTITUTIONAL AUTHORITY

SEC. 601. Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

LIMITATIONS ON THE COUNCIL

SEC. 602. (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to --

(5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of title I of the District of Columbia Income and Franchise Tax Act of 1947);

PART B - SUCCESSION IN GOVERNMENT

ABOLISHMENT OF EXISTING GOVERNMENT AND TRANSFER OF FUNCTIONS

SEC. 711. The District of Columbia Council, the offices of Chairman of the District of Columbia Council, Vice Chairman of the District of Columbia Council, and the seven other members of the District of Columbia Council, and the offices of the Commissioner of the District of Columbia and Assistant to the Commissioner of the District of Columbia, as established by Reorganization Plan Numbered 3 of 1967, are abolished as of noon January 2, 1975. This subsection [section] shall not be construed to reinstate any governmental body or office in the District abolished in said plan or otherwise heretofore.

CERTAIN DELEGATED FUNCTIONS AND FUNCTIONS OF CERTAIN AGENCIES

SEC. 712. No function of the District of Columbia Council (established under Reorganization Plan Numbered 3 of 1967) or of the Commissioner of the District of Columbia which such District of Columbia Council or Commissioner has delegated to an officer, employee, or agency (including any body of or under such agency) of the District, nor any function now vested pursuant to section 501 of Reorganization Plan Numbered 3 of 1967 in the District Public Service Commission, Zoning Advisory Council, Board of Zoning Adjustment, Office of the Recorder of Deeds, or Armory Board, or in any officer, employee, or body of or under such agency, shall be considered as a function transferred to the Council pursuant to section 404(a) of this Act. Each such function is hereby transferred to the officer, employee or agency (including any body of or under such agency), to whom or to which it was delegated, or in whom or

in which it has remained vested, until the Mayor or Council established under this Act, or both, pursuant to the powers herein granted, shall revoke, modify, or transfer such delegation or vesting.

EXISTING STATUTES, REGULATIONS, AND OTHER ACTIONS

SEC. 714. (a) Any statute, regulation, or other action in respect of (and any regulation or other action issued, made, taken, or granted by) any officer or agency from which any function is transferred by this Act shall, except to the extent modified or made inapplicable by or under authority of law, continue in effect as if such transfer had not been made; but after such transfer, references in such statute, regulation, or other action to an officer or agency from which a transfer is made by this Act shall be held and considered to refer to the officer or agency to which the transfer is made.

(b) As used in subsection (a), the term "other action" includes without limitation, any rule, order, contract, compact, policy, determination, directive, grant, authorization, permit, requirement, or designation.

(c) Unless otherwise specifically provided in this Act, nothing contained in this Act shall be construed as affecting the applicability to the District government of personnel legislation relating to the District government until such time as the Council may otherwise elect equal or equivalent coverage.

STATUS OF THE DISTRICT

SEC. 717. (a) All of the territory constituting the permanent seat of the Government of the United States shall continue to be designated as the District of Columbia. The District of Columbia shall remain and continue a body

corporate, as provided in section 2 of the Revised Statutes relating to the District (D.C. Code, sec. 1-102). Said Corporation shall continue to be charged with all the duties, obligations, responsibilities, and liabilities, and to be vested with all of the powers, rights, privileges, immunities, and assets, respectively, imposed upon and vested in said Corporation or the Commissioner.

(b) No law or regulation which is in force on the effective date of title IV of this Act shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act, but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress, except that, notwithstanding the provisions of section 752 of this Act, such authority to repeal shall not be construed as authorizing the Council to repeal or otherwise alter, by amendment or otherwise, any provision of subchapter III of chapter 73 of title 5, United States Code, in whole or in part.

[CHAPTER 258]

AN ACT

To provide revenue for the District of Columbia, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That this Act, divided into articles, may be cited as the "District of Columbia Revenue Act of 1947", and that article I of this Act may be cited as the "District of Columbia Income and Franchise Tax Act of 1947".

* * *

{CHAPTER 258 - July 16, 1947}

ARTICLE I - INCOME AND FRANCHISE TAX ACT

Title I - Repeal of Prior Income Tax Act and Applicability of This Article: General Definitions

Sec. 1. REPEAL OF PRIOR INCOME TAX ACT. The District of Columbia Income Tax Act as approved and enacted July 26, 1939, and as amended, is hereby repealed with respect to taxable years or portions thereof beginning on and after the lst day of January 1947 fro all purposes, except the following purposes in connection with taxes due or accrued under said District of Columbia Income Tax Act:

(a) For the imposition of assessments and penalties, civil and criminal, for the violation of or failure to comply with any provisions of such Act and the regulations prescribed thereunder;

(b) For requiring the marking, filing, and submission of returns and reports required by such Act;

(c) For the examination of all books, records, and other documents, and witnesses;

(d) For the assessment and collection of the taxes imposed by such Act, and the filing of liens therefor; and

(e) For the allowance of refunds of overpayments of any taxes assessed under the provisions of such Act.

Sec. 2. APPLICABILITY OF ARTICLE. The provisions of this Article shall apply to the taxable year or part thereof beginning on the lst day of January 1947 and to succeeding taxable years.

Sec. 4. GENERAL DEFINITIONS. For the purposes of this article and wherever appearing herein, unless otherwise required by the context---

(a) The word "District" means the District of Columbia.

(b) The word "Commissioners" means the Commissioners of the District of Columbia or their duly authorized representative or representatives.

(c) The word "Assessor" means the Assessor of the District of Columbia or his duly authorized representative or representatives.

(d) The word "Collector" means the Collector of Taxes of the District of Columbia or his duly authorized representative or representatives.

(e) The word "person" means an individual (other than fiduciary), a fiduciary, a partnership (other than an unincorporated business), an association, an unincorporated business, and a corporation.

(f) The word "individual" means all natural persons (other than fiduciaries), whether married or unmarried.

(g) The word "fiduciary" means a guardian, trustee, executor, committee, administrator, receiver, conservator, or any other person acting in any fiduciary capacity for any person.

(h) The words "trade or business" include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office.

(i) The word "taxpayer" means any person required by this Article to pay a tax, file a return or report, or apply for a license.

(j) The words "fiscal year" mean an accounting period of twelve months ending on the last day of any month other than December.

(k) The words "taxable year" mean the calendar year or the fiscal year, upon the basis of which the net income of the taxpayer is computed under this Article; if no fiscal year has been established by the taxpayer, they mean the calendar year. The phrase "taxable year" includes, in the case of a return made for a fractional part of a calendar or fiscal year under the provisions of this Article or under regulations prescribed by the Commissioners, the period for which such return is made: *Provided, however,* That no taxpayer may change from a calendar year to a fiscal year or from a fiscal year to a calendar year within any taxable year without the written permission of the Assessor.

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if

on hand at the end of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however,* That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time f such distribution: *And provided, however,* That the word "dividend" shall not include any dividend paid by a mutual life insurance company to its shareholders.

(n) The word "stock" includes a share in any association, joint-stock company, or insurance company.

(o) The word "shareholder" includes a member in an association, joint-stock company, or insurance company.

(p) The words "include", "includes", or "including", when used in a definition contained in this article, shall not be deemed to exclude other things otherwise within the meaning of the word or words defined.

(q) The word "deficiency" as used in this Act with respect to any tax imposed by this article means---

(1) the amount or amounts by which the tax imposed by this article as determined by the

Assessor exceeds the amount shown as the tax by the taxpayer upon his return; or

(2) the amount assessed as a tax by the Assessor if no return is filed by the taxpayer.

(r) The word "corporation" includes any trust, association, joint-stock company, or partnership which is classed or should be classed as a corporation for purposes of Federal income taxation.

(s) The word "resident" means every individual domiciled within the District on the last day of the taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. In the case of any resident who is an elective or appointive officer or an employee of the Government of the United States, and who is domiciled outside the District during the whole of the taxable year, there shall be excluded from the gross income of such resident salaries or wages received from the Government of the United States for services rendered as such officer or employee, and income derived from sources without the District. For the purposes of this Act the domicile of such officer or employee for any taxable year shall be in the State which he expressly declares to be the State of his domicile: *Provided*, That he shall have had a domicile in such State under the laws of such State immediately prior to the beginning of the taxable year for which the tax is claimed. Such declaration must be made in writing, under oath, to the Assessor and the time for filing such declaration shall expire sixty days after written demand to file an income-tax return shall have been received by such officer or employee. As used in this subsection the term "State" means the several States, Territories, and possessions of the United States, and the term "Government of the United States" includes any agency or instrumentality thereof, but does not include the government of the District of Columbia.

(t) The word "nonresident" means every individual other than a resident.

(u) The term "dependent' means any of the following persons over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

(1) A son or daughter of the taxpayer, or a descendant of either.

(2) A stepson or stepdaughter of the taxpayer.

(3) A brother, sister, stepbrother, or stepsister of the taxpayer.

(4) The father or mother of the taxpayer, or an ancestor of either.

(5) A stepfather or mother of the taxpayer.

(6) A son or daughter of a brother or sister of the taxpayer.

(7) A brother or sister of the father or mother of the taxpayer.

(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer.

The terms "brother" and "sister" include a brother or sister of the half-blood. For the purposes of determining whether any of the foregoing relationships exist, a legally adopted child of a person shall be considered a child of such person by blood. The term "dependent" does not include any individual who is a citizen or subject of a foreign country unless such individual is a resident of the United States or of a country contiguous to the United States.

* * *

TITLE VI - TAX ON RESIDENTS AND ON RESIDENTS

SEC.1. DEFINITION.--For the purposes of this article, and unless otherwise required by the context, the words "taxable income" mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 2 of this title and that portion of the entire net income of every nonresident which is subject to tax under title VIII of this article.

* * *

TITLE VIII--TAX ON UNINCORPORATED BUSINESSES

SEC. 1. DEFINITION OF UNINCORPORATED BUSINESS.--For the purposes of this article (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" mean any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee, assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under title VII of this article. The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 percent centum of the gross income is derived from the personal services actually rendered by the individual or

members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.

SEC. 2. TAXABLE INCOME DEFINED.--For the purposes of this title, and unless otherwise required by the context, the words "taxable income" mean the amount of net income derived from sources within the District within the meaning of title X of this article in excess of the exemption granted by section 4 of this title.

SEC. 3. IMPOSITION AND RATE OF TAX--For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 percent centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under title II of this article).

SEC. 4. EXEMPTION.--Before computing the tax upon the taxable income of an unincorporated business, there shall be deducted therefrom an exemption of $10,000, except that where the period covered by a return is less than a year, or where a return shows that an unincorporated business has been carried on or for less than twelve months, such exemption shall be prorated on a daily basis: *Provided, however*, That any amount exempted under this section from the tax imposed by section 3 of this title shall be reported and included in the gross income of that person or those persons entitled to a share therein in proportion to the share to which each person is entitled, and shall be reported in the return of each of such persons for his taxable year in which is ended the taxable year of the unincorporated business.

SEC. 5. BY WHOM PAYABLE.--The taxes imposed by section 3 of this title shall be payable by the person or persons, jointly and severally, conducting the unincorporated business. The taxes imposed under this title may be assessed in the name of the unincorporated business or in the name or name of the person or persons liable for the payment of such taxes, or both.

SEC.6. PARTNERS ONLY TAXABLE.--Individuals carrying on any trade or business in partnership in the District, other than an unincorporated business, shall be liable for income tax only in their individual capacities. The tax on all such income shall be assessed against the individual partners under title VI of this article. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year; or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's income is computed.

* * *

TITLE XII--ASSESSMENT AND COLLECTION; TIME OF PAYMENT

SEC. 1. DUTIES OF ASSESSOR.--The Assessor is hereby required to administer the provisions of this article. As soon as practicable after the return is filed, the Assessor shall examine it and shall determine the correct amount of tax.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* June, 1997.

Joseph J. Mathy, et al.,
Appellants,

against

Commonwealth of Virginia
Department of Taxation,
Appellee.

Record No. 961290
Circuit Court No. L140458

Entered: June 6, 1997

Upon a Petition for Rehearing

On May 16, 1997, came Robert C. Fitzgerald, by counsel, and filed a motion praying for leave to file a brief amicus curiae in this cause.

On consideration whereof, the motion is granted, and the brief amicus curiae is considered filed.

A Copy,

Teste:

/s/David R. Beach
Clerk

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 961290

JOSEPH J. MATHY, et al.
Appellants

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION
Appellees.

BRIEF OF AMICUS CURIAE

Entered: June 6, 1997

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VIRGINIA:
IN THE SUPREME COURT OF VIRGINIA

JOSEPH J. MATHY, et al.,	)
Appellants,	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA	)
DEPARTMENT OF TAXATION,	)
Appellees.	)
	)

Record No. 961290

BRIEF OF AMICUS CURIAE

To the Honorable Chief Justice and Justices of the Supreme Court of Virginia:

Robert C. Fitzgerald files this Brief Amicus Curiae and states as follows:

1. That he adopts the arguments not inconsistent herewith contained in the Petition for Rehearing filed by the Appellant herein. In addition thereto, the undersigned respectfully submits that the Court arrived at a conclusion that is in error because certain facts and Law were not taken into account, as follows:

a. The unincorporated Business Tax, although contained in the District of Columbia Code and enforced by the District of Columbia officials, was adopted by the Congress of the United States in 1947, not the Council of the District of Columbia, as shown in the annotation to

D.C. Code Ann. 47-1803.3, and continued in effect.[1] See Chapter 258, Article I, Title VIII, adopted by 80th Congress, July 16, 1947, Attachment "A".

b. That the effect of the Court's decision is to not apply the principle of the Presumption of the Validity of a legislative enactment of the tax, whether adopted by the Congress of the United States or the Council of the District of Columbia. The burden was on the Department of Taxation to who that the tax was enacted by the Council of the District of Columbia. It failed to do so. William L. Caldwell v. Seaboard System Railroad, Inc., 238 Va. 148, 380 S.E.2d 910 (1989); The City of Charlottesville, et al. v. Martin H. DeHaah, et al., 228 Va. 578, 323 S.E.2d 131 (1984); City Council of the City of Emporia v. Jean Newsome, et al., 226 Va. 518, 311 S.E.2d 761 (1984).

c. That the Virginia Courts lack jurisdiction over necessary parties and the subject matter of the law whether enacted by Congress or the District of Columbia Council, to declare the District of Columbia law illegal.

d. That the Virginia Courts are bound by Article IV, Section 1, of the Constitution of the United States of America to give Full Faith and Credit to the laws of the District of Columbia. This Court's decision fails to do so.

The Virginia court cannot examine the validity of a law of another jurisdiction, it must give Full Faith and Credit to the statute. Hupp v. Hupp, 239 Va. 494, 391 S.E.2d 329 (1990).

---

[1] P.L. 93-198, Title VII, Section 717(b) "No law or regulation which is in force on the effective date of Title IV of this act shall be deemed amended or repealed by this act except to the extent that such law or regulation is inconsistent with this act, but any such law may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress..."

The position of the Department of Taxation adopted by the Court amounts to a collateral attach on the validity of the statute which imposes the unincorporated business tax in the District of Columbia which is not permitted under the Full Faith and Credit clause, Article IV, Section I of the U.S. Constitution. Fauntleroy v. Lum, 210 U.S. 230, 237, 52 L.Ed. 1039, 28 S.Ct. 641 (1908).

e. That the decision of April 18, 1997, contrary to the clear intent of Congress and the Virginia Legislature, punishes the Virginia residents similarly situated. The Congress in adopting the Home Rule Act in 1973 paid heed to the fears of the residents of Virginia and Maryland who commuted to their places of employment in the District of Columbia that they would be subjected to a "commuter" tax by the Council of the District of Columbia using powers granted in the Home Rule Act. Thus, the provisions prohibiting the Council of the District of Columbia from adopting a tax on the personal income of non-residents.

However, when the 1973 Home Rule Act was enacted by Congress in 1947 Act imposing the tax on unincorporated business was in effect and being enforces as required by the Congressional Act.[2] There is absolutely nothing in the 1973 Home Rule Act which shows any intent by the Congress to repeal Title VIII of Chapter 258 adopted by the 80th Congress on July 16, 1947, known as the D.C. Income and Franchise Tax Act of 1947, nor by the Congress since then. While rate changes have occurred since 1947 such amendments are permitted by the Home Rule Act and in no way alters the fact that the tax on unincorporated businesses was adopted by the Congress of the United States, not by the Council of the District of Columbia, whether it has been judicially held to be a tax on net income or not.

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[2] See Attachment "A" [See App. 35-43].

It is ironic that the decision of this court, if left to stand, utilizes a prohibition on the Council of the District of Columbia from taxing the personal income of Virginia residents - a protection for Virginia citizens - to cause both the District of Columbia and the Commonwealth of Virginia to tax Virginia residents on the same income from the same source in the District of Columbia. (When it comes to validity of its own statutes the Courts of the District of Columbia are not bound by the decision of this Court.) Certainly there is not legislative indication that the General Assembly of Virginia or the Congress of the United States had such punishment in mind.

Wherefore, the undersigned urges the Court to grant the Petition for Rehearing filed by the Appellant, that it reconsider its decision and reverse the trial court for the reasons stated herein and in the Petition for Rehearing.

Respectfully submitted,

Mryon C. Smith

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IN THE
SUPREME COURT OF VIRGINIA

Record No. 961290

Joseph J. Mathy
and
Sarah G. Mathy,

Appellants,

v.

Commonwealth of Virginia
Department of Taxation,

Appellee.

Appellants' Petition for Rehearing

Appellants hereby petition this Honorable Court to grant a rehearing with respect to that portion of the opinion herein dated April 18, 1997 by Justice Barbara Milano Keenan decided adversely to Appellants.

The opinion resolves all issues in Appellants' favor with one crucial exception: the opinion finds that the D.C. tax in question is illegal and unauthorized under the D.C. Home Rule Act so that Appellants are not entitled to the credit under the first paragraph of Section 58.1-332A of the Virginia Code because of the second paragraph thereof which prohibits credit

for payment of an out-of-state income tax which is illegal or unauthorized under the enabling act of the jurisdiction imposing the tax.

Appellants respectfully submit that the analysis of this important issue by the opinion is incorrect. The issue should have been decided in Appellants' favor so that Appellants are in fact entitled to the credit which is the subject of this appeal.

There are two reasons why the D.C. tax in question is not illegal or unauthorized by the D.C. Home Rule Act:

First and most importantly, Section 602(a)(5) of the D.C. Home Rule Act only prohibits the D.C. Council from imposing a commuter or income tax on personal income of a nonresident. The D.C. tax in question is not imposed by the D.C. Council but was, and continues to be, imposed by the District of Columbia pursuant to an act of the U.S. Congress, i.e., the D.C. Income and Franchise Tax Act of 1947 as amended. Consequently, the D.C. Council has not imposed a commuter income tax on the personal income of a nonresident in violation of Section 602(a)(5) of the D.C. Home Rule Act. The Congressionally enacted tax in question is clearly legal and authorized.

Secondly, Mr. Mathy's D.C. rental income is not "personal income" protected by Section 602(a)(5) of the D.C. Home Rule Act.

The opinion impugns the legality of another jurisdiction's tax when that tax has not been challenged as illegal for many, many years. A legislative tax statute, particularly one en-acted by the U.S. Congress for the District, should be presumed to be legal in the absence of a judicial determination of illegality by a court of that jurisdiction. Comity should be given such a statute. Finding that such a taxing statute is illegal is an extraordinary step which should not be taken without thorough study and debate.

Appellants submit that a mistake has been made which not only deprives the Mathys of the credit but also deprives many other Virginians of the credit for payment of the D.C.

tax in question, thereby subjecting them to very substantial double taxation. Appellee's legislative impact statements indicate that approximately $4 million of Virginia income tax per year is involved in this decision. The question is very significant in terms of the tax dollars involved. It is important that the decision be correct.

For the above reasons (which are discussed in further detail below), Appellants request the Court to grant Appellants' petition for rehearing.

I

The D.C. tax in question is not imposed by the D.C. Council but by Congress, so it is not illegal or unauthorized by the D.C. Home Rule Act.

The opinion of April 18, 1997 determines that the D.C. tax in question violates Section 602(a)(5) of the D.C. Home Rule Act. That Section by its express terms provides that the Council of the District of Columbia has no authority to impose a commuter tax, defined as "any tax on the whole or any portion of the personal income of any individual not a resident of the District." What the opinion fails to realize is that the D.C. tax in question is not imposed by the D.C. Council. The tax was and is imposed by the District of Columbia pursuant to the D.C. Income and Franchise Tax Act of 1947, as amended, an act of the U.S. Congress, not by an enactment of the D.C. Council.[1]

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[1] Please note, as pointed out in Appellants' briefs previously filed, that the official law which imposes the tax in question is the D.C. Income and Franchise Tax Act of 1947 as amended, not the provisions of the D.C. Code. The D.C. Income and Franchise Tax Act of 1947 is Article I of the D.C. Revenue Act of 1947. See 61 Stat. 345, Ch. 258, Art. I, Title VIII. The D.C. Code sections were furnished to the Court as a convenience with the request that the Court take judicial

Congress has plenary legislative power over the District of Columbia by virtue of Article I, Section 8 of the U.S. Constitution. It can impose any kind of nondiscriminatory tax it wishes with respect to the District and with respect to District sourced income of residents and nonresidents. The tax in question was first imposed 50 years ago by Congress in the D.C. Income and Franchise Tax Act of 1947 in almost the exact same terms as the current version and that tax has been continued and carried over to this very day.

When the D.C. Home Rule Act was enacted by Congress in 1973 effective in 1975, all existing laws affecting the District of Columbia were expressly continued in effect. See Section 714, Home Rule Act; Section 1-213 of the D.C. Code. The D.C. Income and Franchise Tax Act was one of those taxes carried over. It remained in effect and still remains in effect. At the same time, Congress provided that all functions of the old D.C. Council were transferred to the new Council of the District of Columbia. Section 1-227 of the D.C. Code. One of the functions thus transferred to the new Council was the authority to change the rates of tax in the D.C. Income and Franchise Tax Act of 1947, a function theretofore carried out from time to time by the old D.C. Council pursuant to Section 47-504 of the D.C. Code.

All of the amendments since 1947 set forth in the parenthetical listing of amendments immediately following Section 47-1808.3, the codified equivalent of Section 3 of the D.C. Income and Franchise tax which levies the tax in question, have been changes in the rates of tax, as authorized by Congress in Section 47-504, supra. That includes the changes made by the new Council after 1975, each of which merely changes the rate of tax or adds a surtax (which is really

(..continued)

notice of the official law. A copy of the D.C. Income and Franchise Tax Act of 1947 as originally enacted by Congress is attached hereto as Exhibit A.

just a change of rate) or changes the minimum tax rate (again just a change of rate).[2] It is the D.C. Income and Franchise

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[2] The amendments to Section 3, D.C. Income and Franchise Tax Act of 1947 (Codified at Section 47.1808.3) by the new D.C. Council after Home Rule became effective in 1975 are:

(1) §§604, 605 of the D.C. Law 1-23, Title VI, 22 D.C.R. 2112 (Oct. 21, 1975) which in addition to attempting to repeal the professional and personal services exemptions (Sections 605) found illegal in the Bishop v. District of Columbia, 401 A. 2d 955 (D.C. App. 1979), affirmed en banc 411 A. 2d 997 (D.C. App. 1980), merely changed the tax rate to 12% for taxable years 1975 and to 9% for years after 1975 and added a surtax of 10% of the tax for 1976. (Section 604).

(2) §3 of D.C. Law 1-77, 23 D.C.R. 1219 (July 27, 1976) extended the 10% surtax to 1977.

(3) §202 of D.C. Law 2-58, 24 D.C.R. 5765 (Mar. 16, 1978) extended the surtax to 1978 and thereafter.

(4) §903 of D.C. Law 5-14, 30 D.C.R. 2632 (June 22, 1983) increased the minimum tax to $100.

(5) §302(b)(2) of D.C. Law 5-113, 31 D.C.R. 3974 (Sept. 26, 1984) changed the surtax rate from 10% to 5% after October 1, 1984.

(6) §2(h)(3) of D.C. Law 7-29, 34 D.C.R. 5097 (Oct. 1, 1987) changed the surtax rate to 2.5% after September 30, 1987. 34 D.C.R. 5097 (Oct. 1, 1987)

(7) §2(e) of D.C. Law 8-17, 36 D.C.R. 4160 (July 26, 1989) varied the surtax rate for future years from 2.5% to 5% and then back 2.5%.

(8) §103(d) of D.C. Law 10-148, 41 D.C.R. 2096 (June 14, 1994) increased the rate to 9.5% for taxable periods after 12/31/94.

(9) §301(b) of D.C. Law 10-188, 41 D.C.R. 5333 (Sept. 28, 1994), added a second surtax of 2.5% of the basic tax for taxable periods after 10/1/94.

Tax Act adopted by Congress which enacted the tax in question and thereby imposed it, not an enactment by the new D.C. Council.

Section 602(a)(5) of the D.C. Home Rule Act only prohibits the new D.C. Council from imposing a commuter tax on personal income of a nonresident. The tax in question is not imposed by the D.C. Council, but by Congress. Consequently, the imposition of the tax in question does not violate the prohibition of Section 602(a)(5) of the D.C. Home Rule Act. This is the primary reason there has been no challenge to the tax in question in the 22 years since Home Rule became effective in 1975 or in the 17 years since the Bishop case found the tax in question to be an income tax.

Appellants respectfully submit that this Honorable Court should have decided that the D.C. tax in question is not illegal or unauthorized by the D.C. Home Rule Act. The opinion of April 18, 1997 was therefore incorrectly decided. The Court should grant Appellants' Petition for Rehearing on this issue, so the opinion and decision of this Court can be corrected.

II

Mr. Mathy's rental business income is not "personal income" protected by Section 602(a)(5) of the D.C. Home Rule Act.

The opinion of April 18, 1997 determined that Mr. Mathy's rental business income was "personal income of a nonresident of the District" and the tax thereon was violative of the prohibition against the D.C. Council's imposing the tax thereon. Aside from the fact that the D.C. Council has not imposed the tax in question at all, the kind of income which the prohibition protects does not include rental business income. Such income simply is not personal income protected by the Home Rule Act.

In quoting the Groom court with approval, the Bishop court indicated the kind of personal income protected by the Home Rule Act. It reads:

> "Although this Congressional prohibition [Section 602(a)(5)] has served to protect nonresidents of the District of Columbia who are salaried employees or wage earners from D.C. income taxes, the removal of the exemption by the D.C. Council had the effect of subjecting all persons engaged in business, self-employed trades or professional occupations to the same tax in another guise. [Groom v. Forst, supra, at 3 (emphasis supplied).]" 401 A. 2d at p. 958

Note that the Bishop court thus indicated that Section 602(a)(5) of the Home Rule Act prior to the Council's attempted repeal of the exemptions prevented the Council from imposing a tax on wages and salaries of nonresidents earned in the District. It then notes that the attempted repeal of the exemptions by the D.C. Council served to impose the tax on the business income of professionals and others previously exempted by Congress. The types of business income thus attempted to be brought under the tax by the repeal were professional income and personal service income.

The point is that the Bishop court construed the "personal income of nonresidents" to mean wages, salaries, professional fees and other personal service income. The common feature of these kinds of income is that they are personally earned by wage and salary earners, professionals and other personal service providers. Conspicuously absent is mention of other types of business income i.e. other kinds of income not previously exempted which continued to be taxed as they had been since 1947 and right up to today. Mr. Mathys rental business income has never been exempted and

is not exempted from the Congressionally enacted tax in question now. The personal income protected by the Home Rule Act is the personal income identified by the Bishop court. Congress taxed nonexempted business income under this tax statute for more than 28 years before 1975 and continues to tax such income even now under the D.C. Income and Franchise Tax Act of 1947 as amended. Such income has thus been taxed by the District of Columbia under this Congressionally enacted statute for upwards of 50 years.

The Califano case does not change the above.[3] There the D.C. Court of Appeals determined that the New York City so-called unincorporated business income tax was an individual income tax imposed on the professional legal fees of a D.C. resident so it was creditable against the D.C. resident's income tax under the credit provision of the D.C. Income Tax which permits credit for payment of out-of-state "individual" income taxes. The D.C. Court of Appeals in Califano noted that the Bishop case had determined that such a tax imposed on professional fees of a nonresident was a tax on personal income of an individual which the Court then said made such a tax an individual income tax. We have no quarrel with the Califano case. We agree that a tax on professional legal fee income is a tax on personal income just as the Bishop court determined and that such a tax is an individual income tax because of it.

That doesn't mean that all income of an individual is "personal income" within the meaning of the Home Rule Act. It merely means that professional legal fees, i.e. earned income from personal services such as Mr. Califano's legal fee income, constitutes "personal income." That is exactly what the Bishop case inter alia determined. The D.C. Court of Appeals determined that the tax in question is an income tax,

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[3] District of Columbia v. Califano, 647 A. 2d 761 (D.C. App. 1994).

and when applied to professionally earned legal fee income, it is a tax on "personal income." The Court did not say or imply that the tax on other kinds of non-earned business income is a tax on "personal income." It had already identified the kinds of personally earned income that fell into that protected category.

Since Mr. Mathy's rental business income is not personally earned income and therefore is not "personal income" protected from taxation by the Home Rule Act, the opinion of April 18, 1997 which found that such rental income does constitute "personal income" for that purpose is incorrect. Appellants' petition for rehearing should therefore be granted, so this mistake can be corrected.

The Court, of course, need not reach this question if it determines that the tax in question is simply not imposed by the D.C. Council but, as shown above, is imposed by the District of Columbia pursuant to the Congressionally enacted D.C. Income and Franchise Tax Act of 1947 as amended.

III

The Opinion impugns the legality of another jurisdiction's tax, which should be presumed to be legal unless determined to be illegal by that taxing jurisdiction. Comity must be given that jurisdiction's tax legislation.

The Opinion of April 18, 1997 finds that the D.C. tax in question is illegal and unauthorized by the D.C. Home Rule Act. This will come as a surprise to the District of Columbia which has imposed the tax on rental business income for upwards of 50 years without challenge. Another jurisdiction's tax, particularly one enacted for it by the U.S. Congress, should be presumed to be legal in the absence of a judicial determination of illegality by a court of that taxing

jurisdiction. Comity must be given that jurisdiction's legislation. Finding another jurisdiction's tax illegal and unauthorized is a highly unusual and extraordinary step which should not be taken without thorough study and debate. Unfortunately the time permitted for oral argument on February 25, 1997, did not permit adequate consideration of this important question.

IV

The question before the Court is one involving substantial amounts of tax which warrants close study to see that the question is correctly decided.

The legislative impact statements of the Department of Taxation indicate that approximately $4 million of Virginia income tax per year is involved in the creditability of payments of the D.C. tax by Virginia residents. That translates into approximately $90 million of income of Virginia residents being taxed each year by the District of Columbia. Creditability of the payment of such taxes is therefore a very significant question which should in all fairness be decided as correctly as humanly possible. Appellants' petition for rehearing should therefore be granted so that there is no possibility of error in the Court's decision.

Conclusion

Appellants respectfully request (a) that Appellants' Petition be granted, (b) that the Court determine that the D.C. tax in question is not illegal under or unauthorized by the D.C. Home Rule Act for the reasons set forth herein and (c) that the Court determine that Appellants are therefore entitled to the refund of taxes sought herein, plus interest as allowed by law.

Respectfully submitted,

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ASSIGNMENTS OF ERROR

The Court below erred in the following respects:.....

(9) In holding the Appellant's attack on the constitutionality of the second paragraph of Section 58.1-332A of the Virginia Code per se and/or as applied in the Mathy case is without merit, including the Court's failure to give any reasons supporting its decision on this point or to identify any rationale state policy supporting its determination and in relying on DiAntonio v. Northampton-Accomack Memorial Hospital, 628 F.2d 287 (4th Cir. 1980) which clearly does not support the court's decision and, if anything, supports Appellants' position.

OCT 9 1997
CLERK

No. 97-412

In The

Supreme Court of the United States

October Term, 1997

JOSEPH J. MATHY et al.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

Whether the Supreme Court of Virginia decided a question of federal law or addressed a state law issue only when it decided that the petitioners were not entitled to a credit against Virginia individual income taxes for payments of the District of Columbia tax on unincorporated businesses?

Whether petitioners attempted to raise a new federal question in their Petition for Rehearing to the Supreme Court of Virginia, which was denied?

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STATEMENT OF THE CASE

The petitioners, Joseph J. Mathy and Sarah G. Mathy, challenge the interpretation and application of § 58.1-332 of the Code of Virginia of 1950, as amended (the Code). The Circuit Court for the City of Alexandria granted summary judgment to the Virginia Department of Taxation (the Department), ruling that the Mathys were not entitled to tax credits against their Virginia taxable income for the years 1991 through 1993 because the District of Columbia tax on unincorporated businesses, D.C. Code § 47-1808.1, (the DCUBT) in question was an unincorporated business tax, ineligible for the credit under § 58.1-332 of the Code. The Mathys appealed the decision of the lower court to the Supreme Court of Virginia, which granted an appeal on October 23, 1996. On April 18, 1997 the Supreme Court of Virginia affirmed the decision of the trial court but on different grounds, finding that the Mathys were not entitled to the Virginia credit against individual income taxes because the plain language of § 58.1-332(A), as applied to the DCUBT, denied the credit. The decision is reported at *Mathy v. Commonwealth*, 253 Va. 356, 483 S.E.2d 802 (1997). On May 15, 1997 the Mathys filed a Petition for Rehearing in the Supreme Court of Virginia, raising for the first time a new reason for finding that the credit should be allowed. By its Order dated June 6, 1997, the Supreme Court of Virginia denied the Petition for Rehearing and the petitioners subsequently filed their Petition for Writ of Certiorari with this Court.

The Department asserts that the petitioners have misinterpreted the decision of the Supreme Court of Virginia

in *Mathy* by phrasing their question presented and jurisdictional statements as if the Supreme Court of Virginia interpreted the DCUBT in isolation and purported to render a decision with respect to that statute which would have an impact in the District of Columbia. In fact, the Supreme Court of Virginia addressed a question of Virginia law involving the availability of a credit against individual income taxes for certain taxes paid by Virginia residents to other states. In interpreting the Virginia statute, the Supreme Court of Virginia had to evaluate the DCUBT and found that "the tax [the DCUBT] imposed on the Mathys is illegal and unauthorized under the Home Rule Act **for purposes of qualifying for a credit under Code § 58.1-332(A)** . . . " *Mathy*, 253 Va. at 362 (emphasis added).

In their Petition for Rehearing, petitioners attempted to challenge the finding of the Supreme Court of Virginia by raising for the first time the argument that the DCUBT was not imposed by the D.C. Council and therefore could not run afoul of the District of Columbia Home Rule Act.[1] This argument was not briefed by the Department or argued orally and was not considered by the Supreme Court of Virginia, which denied the Petition for Rehearing.

Under the rules and guidelines of this Court for the exercise of certiorari the petitioners must present an important federal question which should be decided by the Court. The petitioners have failed to establish any

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[1] Home Rule Act is the popular name for the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

federal question, better yet a substantial or important federal question. Similarly, the attempt by petitioners to create a federal question is based in part on a legal argument first raised in their Petition for Rehearing, which the Supreme Court of Virginia did not consider.

REASONS FOR DENYING THE WRIT

1. The Lack of a Substantial Federal Question.

The petitioners have attempted to craft a federal question by focusing solely on the DCUBT and not on the question presented to the Supreme Court of Virginia and answered by it. This case has always involved nothing more or less than an issue of state tax law. Virginia law[2] provides a credit against the individual income tax of Virginia residents for certain taxes paid to another state.

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[2] Section 58.1-332 of the Code of Virginia provides, in pertinent part, as follows:

A. Whenever a Virginia resident has become liable to another state for income tax on earned or business income . . . for the taxable year, derived from sources outside the Commonwealth and subject to taxation under this chapter, the amount of such tax payable by him shall . . . be credited on the taxpayer's return with the income tax so paid to the other state.

However, no franchise tax, license tax, excise, unincorporated business tax, occupation tax or any tax characterized as such by the taxing jurisdiction, although applied to earned or business income, shall qualify for a credit under this section, nor shall any tax which, if characterized as an income tax or a commuter tax, would be illegal and unauthorized under such other state's controlling or enabling legislation qualify for a credit under this section.

Va. Code § 58.1-332 (Repl. Vol. 1997).

Va. Code § 58.1-332 (Repl. Vol. 1997). There are, however, several limitations on the availability of the credit. The credit is not allowed for the payment of the types of taxes enumerated in the second paragraph of paragraph A of § 58.1-332. The exclusion which the Supreme Court of Virginia focused on in *Mathy* is that which denies a credit for taxes which, if characterized as an income tax or commuter tax, would be illegal and unauthorized under the controlling or enabling legislation of that state. *Id.*

The Supreme Court of Virginia noted that it was bound by principles of comity and prior precedent to find that the DCUBT is an income tax. *Mathy*, 253 Va. at 360 *citing Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979); *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990). In so finding, the Supreme Court of Virginia noted that the "Mathys are entitled to a credit under Code § 58.1-332(A) unless the tax 'would be illegal and unauthorized under such other state's controlling or enabling legislation.' . . . Therefore, . . . we must determine whether the UB tax would be illegal and unauthorized under the District of Columbia's Home Rule Act." *Mathy*, 253 Va. at 361. The only purpose for which the Supreme Court of Virginia addressed the DCUBT was to determine whether the petitioners were entitled to a tax credit under Virginia law.

In support of their contention that a substantial federal question is presented, the petitioners argue that the D.C. Council does not impose the DCUBT and therefore the proscription in the Home Rule Act that "the [District of Columbia] Council shall have no authority to . . . (5)

impose any tax on the whole or any portion of the personal income, either directly or indirectly or at the source thereof, of any individual not a resident of the District"[3] does not apply. At all stages of the litigation of this case prior to the Petition for Rehearing, the petitioners argued only that the DCUBT did not violate the Home Rule Act because it was not a tax on "personal income" although it is an income tax. The issue of the legality of the DCUBT was squarely before the trial court and the Supreme Court of Virginia and the petitioners did not present the argument that was first presented in the Petition for Rehearing.[4] Petitioners also renew their contention that the DCUBT is not a tax on "personal income", a determination which clearly does not present an important federal question worthy of a grant of certiorari by this Court.

2. The Failure to Present An Issue Involving the Full Faith and Credit Clause, Comity or the Supremacy Clause.

The petitioners make essentially unsupported assertions that this case presents issues involving the Full

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[3] Home Rule Act at § 602(a)(5).

[4] The Department disputes the validity of the argument made with respect to the application of the Home Rule Act, but does not reach the merits of that argument at this stage of the proceedings. The Department does note that the court in *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979), *aff'd en banc*, 411 A.2d 997 (1980), addressed the legislative activity of the D.C. Council in enacting the DCUBT.

Faith and Credit[5] and Supremacy[6] Clauses of the United States Constitution. The Petition provides no authority for its claim that the decision of the Supreme Court of Virginia in *Mathy* violated the Supremacy Clause of the Constitution. As discussed below, the Supremacy Clause is not implicated in this litigation. Similarly, the Petition asserts that the Supreme Court of Virginia in its decision was required to give full faith and credit and comity to the DCUBT in deciding the Virginia income tax issue before it and in support of those assertions refers the Court, without discussion, to *Fauntleroy v. Lum*, 210 U.S. 230 (1908) and *Elmendorf v. Taylor*, 10 Wheat. 152, 159-160 (1825). Neither of these cases support the proposition for which they are cited in the Petition.

Supremacy Clause

Under the Supremacy Clause, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the Constitution' are invalid." *Wisconsin Public Intervenors v. Mortier*, 501 U.S. 597, 604 (1991) *quoting Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824). The Supremacy Clause applies in instances of federal preemption, which is not involved in the current controversy. This Court has stated that "[s]tate law may run afoul of the Supremacy Clause in two distinct ways: the law may regulate the Government directly or discriminate against it . . . or it may conflict with an affirmative command of Congress." *North Dakota v. United States*, 495 U.S. 423, 434

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[5] Article IV, cl.1, U.S. Constitution.

[6] Article VI, cl. 2, U.S. Constitution.

(1990). Neither situation as discussed in *North Dakota* is present in *Mathy*.[7] The key to understanding the application of the Supremacy Clause is found in a decision by this Court, this year, in *Printz v. United States*, 521 U.S. ___, 117 S. Ct. 2365 (1997). In *Printz*, the Court recognized that the Supremacy Clause "makes 'Law of the Land' only 'Laws of the United States which shall be made in pursuance [of the Constitution]' " and does not extend to every act of Congress. *Id*. Nothing in the Petition suggests that any aspect of the DCUBT is in pursuance of the U.S. Constitution and accordingly the Supremacy Clause is not applicable in any circumstance.

Full Faith and Credit and Comity

The principle of comity and the concept of full faith and credit often are discussed in tandem, as is done in the Petition, without distinguishing between the two. Although not cited by the Petition, the concept of full faith and credit is based in Article IV, clause 1 of the U.S. Constitution, which provides that "[f]ull faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." The principle of comity, on the other hand, is often relied on in situations in which the full faith and credit clause does not apply but, out of courtesy and mutual interest, courts give recognition and effect to legislative, executive and judicial acts of another jurisdiction. *Eastern Indemnity Co.*

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[7] The Supremacy Clause argument presumably is founded in the petitioners' theory that the DCUBT is an act of Congress. Even assuming that premise is correct, the Supremacy Clause is not implicated in this matter for the reasons stated herein.

v. Hirschler Fleischer, 235 Va. 9, 366 S.E.2d 53 (1988); *Clark v. Clark*, 11 Va. App. 286, 398 S.E.2d 82 (1990).

The Supreme Court of Virginia adhered to the principle of comity in the *Mathy* decision, to the extent the principle was applicable. The Supreme Court of Virginia in a predecessor case to the pending matter specifically identified the principle of comity in its decision in finding it was "bound by the interpretation given by the highest court of a sister jurisdiction to the law of that jurisdiction." *King v. Forst*, 239 Va. 557, 560 (1990) *citing Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152 (1825). As noted in *King*, the decision in *Elmendorf* does not stand for the proposition that the Supreme Court of Virginia must "recognize and enforce the legislative acts of the District of Columbia" as asserted in the Petition. Petition at 17. Rather, *Elmendorf* states a "disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825). This is the principle applied by the Supreme Court of Virginia in *Mathy* in its finding that the DCUBT constitutes a tax on personal income. The court indicated that it was applying the principle of comity by applying the rule of *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979), *aff'd en banc*, 411 A.2d 997 (1980). The Supreme Court of Virginia held that it was bound by the finding of the court in *Bishop* that " '[t]he tax is levied upon personal income.' " *Mathy*, 253 Va. at 362, *quoting Bishop v. District of Columbia*, 401 A.2d at 961. The court in *Mathy* also found that the District of Columbia Court of Appeals also had determined that the DCUBT is a personal income tax

in *District of Columbia v. Califano*, 647 A.2d 761. 763 (D.C. 1994). *Mathy*, 253 Va. at 362.

The Supreme Court of Virginia was not presented with an issue of full faith and credit or comity in looking further at the DCUBT and determining that it is illegal and unauthorized under the Home Rule Act. The issue before the Supreme Court of Virginia was one of first impression, never having been considered by a court in the District. And further, the Supreme Court of Virginia was in the position only of interpreting the DCUBT for purposes of applying Virginia law. The full faith and credit clause was not intended to be "an unrestricted and inexorable mandate to be used to subordinate or set at naught one state's sovereign powers to those of another. . . . The policies of a state that involve its public acts, records, judicial proceedings, fundamental laws or like sovereign rights and interests do not fall within the spirit or intended purpose of the clause . . . " *Wallihan v. Hughes* 196 Va. 117, 129, 82 S.E.2d 553, 561 (1954). The court in *Mathy* was interpreting Virginia law and in so doing, of necessity, interpreted the DCUBT, addressing a question not previously addressed judicially. In fact, the Supreme Court of Virginia applied federal law, the Home Rule Act, to the DCUBT, in a case of first impression, in an attempt to reconcile the two statutes. In doing what it was charged to do, the court determined that the DCUBT was in conflict with the Home Rule Act.

The Supreme Court of Virginia was not purporting to enforce or not enforce the DCUBT; the court interpreted the D.C. statute in order to apply the Virginia statute in question. The petitioners encourage this Court to grant

their petition because of the potential impact of the decision of the Supreme Court of Virginia in the District of Columbia and claim error by the court in "failing to recognize the presumption of correctness of the assessment of the D.C. tax in question." Petition at 18. In fact, the decision of the Supreme Court of Virginia has no impact on the District of Columbia. The court was clear in its decision that its finding with respect to the DCUBT was "for the purposes of qualifying for a credit under [Virginia law]." *Mathy*, 253 Va. at 362.

The decision in *Fauntleroy v. Lum*, 210 U.S. 230 (1908), does not support the petitioners' contention in the Petition that the Supreme Court of Virginia was bound "to give full faith and credit and comity, not only to the judicial decisions of the District of Columbia, but also to the legislative acts of the District of Columbia." Petition at 16. *Fauntleroy* involved an action on a Missouri judgment brought in a Mississippi court. 210 U.S. at 233. The underlying claim for which the judgment was rendered involved futures trading which was illegal in Mississippi. Although the initial action could not have been brought in Mississippi, the plaintiff in *Fauntleroy* had a valid Missouri judgment which he could enforce in Mississippi. That represents the full extent of the decision in *Fauntleroy* and it has no application to the pending matter. The doctrine expressed in the case is that "the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced . . . " *Id.* at 236, *quoting Hampton v. McConnel*, 3 Wheat. 234 (1818).

The Petition, again without discussion, claims error in failing to presume the validity of the DCUBT and in

support of that position cites three decisions of the Supreme Court of Virginia which do not support their position. The cases cited, *Caldwell v. Seaboard System Railroad, Inc.*, 238 Va. 148, 380 S.E.2d 910 (1989), *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984), and *City Council of Emporia v. Newsome*, 226 Va. 518, 311 S.E.2d 761 (1984), were all cases decided by the Supreme Court of Virginia involving questions of Virginia law and the presumption referred to by petitioners is the presumption given acts of the Virginia General Assembly by the courts in Virginia. For example, the Supreme Court of Virginia in *Newsome* stated that [e]very law **enacted by the General Assembly** carries a strong presumption of validity." 226 Va. at 523 (emphasis added).

3. The Failure to Establish Any Issue Involving the Equal Protection or Due Process Clauses of the U.S. Constitution.

In their attempt to craft some argument involving a federal question or the Constitution, the petitioners assert, again without support, that by denying the Virginia credit to the petitioners they are subjected to double taxation in violation of the equal protection clause and the due process clause of the U.S. Constitution. Petition at 19. As the petitioners did not provide any authority to support their assertion that the decision in *Mathy* violates the equal protection and due process clauses, it is impossible to analyze their theory. In an attempt to address the issue raised, however cursorily, the Department notes that the denial of the credit to petitioners is not discriminatory nor does it violate the equal protection clause.

There is no aspect of discrimination or arbitrariness in the interpretation or application of § 58.1-332 of the Virginia Code and petitioners do not point to any such discrimination or arbitrariness. The fact that a law makes classifications and may apply to a class only does not mean that it is a special law or that it is discriminatory. *Martin's Executors v. Commonwealth,* 126 Va. 603, 102 S.E. 77 (1920). A law will be valid as long as it applies equally to all persons within the class. *DiAntonio v. Northampton-Accomack Memorial Hospital,* 628 F.2d 287 (4th Cir. 1980).

Petitioners make no allegation that § 58.1-332 is not applied equally to all taxpayers subject to the enumerated taxes. Section 58.1-332 provides a credit to taxpayers in certain circumstances and all other credits are denied. Many taxpayers with income sourced outside Virginia are not granted a credit against Virginia income taxes, including those with unearned or nonbusiness income sourced outside Virginia. The General Assembly of Virginia has provided credits in certain instances in an act of legislative grace, none of which is mandated by any interpretation of constitutional law.

CONCLUSION

The Petition for Certiorari does not present any federal question, notwithstanding petitioners' efforts to create any number of federal and Constitutional arguments. The fact remains that the Supreme Court of Virginia in *Mathy* decided a question of Virginia law – the availability of a tax credit to the petitioners for taxes paid with respect to non-Virginia sourced income. The paucity of

support for the various arguments propounded by the petitioners provides perhaps the best analysis of the weakness of their arguments. The Petition fails to establish any issue sufficient to warrant a grant of the writ and, accordingly, the Department respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 97-412

In The
Supreme Court of the United States

October Term 1997

JOSEPH J. MATHY,
and
SARAH G. MATHY,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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Petitioners' Reply

Petitioners respectfully reply to the Respondent's Brief in Opposition to Petitioners Petition for Writ of Certiorari as follows:

1. The Supreme Court of Virginia did in fact decide a substantial question of federal law, contrary to the assertion of the Respondent.

Respondent's attempt to limit the decision of the Supreme Court of Virginia to a mere question of state tax law is not a fair reading of that Court's opinion. Even a casual reading of that opinion indicates quite clearly that the Supreme Court of Virginia had to decide the question of federal law which is the subject of Petitioners' Petition for Writ of Certiorari in order to decide the state tax credit entitlement.

While the federal question involved arose in the context of the entitlement of Petitioners to the out-of-state tax credit for Virginia income tax purposes, the Virginia General Assembly in Virginia Code Section 58.1-332A made that entitlement turn on whether the tax paid to the other state, here to the District of Columbia, was illegal or unauthorized under the enabling act of the taxing jurisdiction. The Supreme Court of Virginia itself characterized the issue before it as follows:

> "the Mathys are entitled to the credit under Code Section 58.1-332(A) unless the tax 'would be illegal and unauthorized under such other state's controlling or enabling legislation.' …

> Therefore, ... we must determine whether the UB tax [the D.C. tax in question] would be illegal and unauthorized under the District of Columbia's Home Rule Act." *Mathy v. Commonwealth of Virginia Department of Taxation*, 253 Va. 356 at 361.

The Supreme Court of Virginia then proceeded to determine that the District of Columbia unincorporated business income tax (Title VIII of the D.C. Income and Franchise Tax Act of 1947 as amended) is illegal and unauthorized by Section 602(a)(5) of the D.C. Home Rule Act as applied to the District sourced business income of a nonresident. *Mathy*, 253 Va. At 362.

The District of Columbia unincorporated business income tax and the Home Rule Act are federal laws enacted by Congress. The Virginia Supreme Court undertook to determine the legality of the D.C. tax in question under the D.C. Home Rule Act and did so, albeit incorrectly in Petitioners' view. Construing the D.C. unincorporated business tax as illegal under the D.C. Home Rule Act as applied to a nonresident is clearly a determination of a federal question.

Questions arising in a state court relating to the scope and construction of a federal statute are federal questions which may appropriately be reviewed by the United States Supreme Court on certiorari. *Moody v. McDaniel*, 190 F. Supp. 24 (D. Miss. 1960). The fact that the federal question arises in a state law context does not mean the question is any less a federal question.

The issue involved is a substantial one. According to the Virginia Department of Taxation, the amount of Virginia tax revenues involved in this issue exceeds $4

million per year if the D.C. tax in question is legal as applied to Virginians under the D.C. enabling legislation. See 1991 Legislative Impact Statements with respect to Virginia House Bill 1734 and Virginia Senate Bill 765, which bills in 1991 enacted the second paragraph of Virginia Code Section 58.1-332A, the Virginia tax provision in issue. If the Virginia Supreme Court's determination that the D.C. tax in question is illegal as applied to nonresidents of the District is allowed to stand, a veritable stampede of litigation against the District of Columbia can be expected, not just from Virginians but from any and all nonresidents of the District who have paid the D.C. tax in question on their D.C. sourced business income.

2. The federal question involved, i.e. whether the D.C. tax in question is illegal or unauthorized under the D.C. Home Rule Act, was raised by Respondent and was argued by both parties at every stage of the litigation.

Respondent argued that the D.C. tax in question was illegal under Section 602(a)(5) of the Home Rule Act. Petitioners argued that the tax was legal and was not barred by Section 602(a)(5). In addition, Petitioners argued that the income being taxed by the D.C. tax in question was not the kind of income protected by Section 602(a)(5).

Petitioners fully expected the Virginia Supreme Court to read Section 602(a)(5) of the Home Rule Act which by its terms bars only the new D.C. Council from enacting a commuter tax, not the U.S. Congress. When it became apparent from the opinion of Justice Keenan that the Virginia Supreme Court justices had not focused on what Section 602(a)(5) plainly says, Petitioners brought the perfectly obvious fact to the Court's attention in its timely Petition for Rehearing. Contrary to the Respondent's assertion, the

Supreme Court of Virginia did consider Petitioner's Petition for Rehearing and the Amicus Curiae brief filed and admitted to the record which clearly made this point, but the Court chose to deny Petitioner's Petition for Rehearing. That does not mean the Court did not consider the argument. In fact Petitioners' Petition for Writ of Certiorari is based not only on the adverse opinion of the Supreme Court of Virginia on the federal question at issue, but also on that Court's denial of Petitioners' Petition for Rehearing, a reliance specifically sanctioned by the Rules of the United States Supreme Court. Rule 13(3)of the Rules of the Supreme Court of the United States.

The question whether the D.C. tax in question is illegal as applied to a nonresident under Section 602(a)(5) of the D.C. Home Rule Act is a question of federal law. It was timely raised and considered by the Supreme Court of Virginia. Petitioners arguments were timely raised and considered by the Supreme Court of Virginia.

3. Respondent's assertion in its footnote 4 on page 5 of its Brief in Opposition that the Court in the *Bishop* case "addressed the legislative activity of the D.C. Council in enacting the DCUBT" is an incorrect characterization of the *Bishop* case. The *Bishop* court does not state that the D.C. Council enacted the DCUBT.

The *Bishop* court itself noted that the tax in question was enacted by Congress. The court then noted that Section 605 of the Revenue Act of 1975 adopted by the new D.C. Council repealed the professional exemption (which had been in the law since it was originally enacted by Congress in 1947) and thereby subjected professionals to the tax in question on their D.C. sourced professional income The Court then determined that the repeal was illegal and

unauthorized by Section 602(a)(5) of the Home Rule Act which prohibits the D.C. Council from imposing a tax on the personal income of a nonresident. What was objectionable was the D.C. Council's attempt to cause imposition of the tax on the personally earned income of individuals theretofore exempted from the tax. The ***Bishop*** court thus found that D.C. Council's repealing the exemption was an attempt to cause imposition of the tax on the professional income of nonresidents. The attempted repeal had the effect of subjecting previously exempted nonresidents' personal incomes to the tax. The Court did not say that the D.C. Council imposed the tax in the first place. Congress did that and continues to do so. Attempting to repeal the exemptions was the D.C. Council's backdoor way of attempting to impose the tax on the professional income of previously exempted nonresidents.

The tax on nonresidents, such as Mr. Mathy, on their District sourced rental business income which has never been exempted is entirely imposed by Congress. The new D.C. Council has literally done nothing to impose the tax on those nonresidents who were already subject to the tax long before the Home Rule Act became law.

4. The District of Columbia tax in question is obviously made by Congress in pursuance of the Constitution, contrary to Respondent's assertion.

Respondent says the Supremacy Clause only applies to laws made in pursuance of the Constitution and the D.C. tax in question is not such a law. The D.C. tax in question is clearly made pursuant to Article I, Section 8 of the U.S. Constitution which gives Congress plenary power to legislate for the District of Columbia. To the extent the Virginia Supreme Court has failed to give effect to the D.C. tax in question, a federal law enacted by Congress, the Virginia

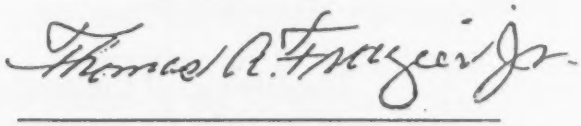
Supreme Court has failed to recognize the Supremacy of the federal law.

Conclusion

Petitioners respectfully reaffirm each of their positions in their Petition. The most important federal question is whether the Supreme Court of Virginia erred in determining that the D.C. tax in question is illegal and unauthorized by Section 602(a)(5) of the D.C. Home Rule Act. The fact that the question arose in a state law context does not make it any less a federal question. As the Supreme Court of Virginia stated: "We must determine whether the UB tax would be illegal and unauthorized under the District of Columbia's Home Rule Act." That is a federal question. The Supreme Court of Virginia decided that question, albeit erroneously, and to correct that error is the essence of Petitioners' Petition.

October 17, 1997

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